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In the Supreme Court of the United States

October Term, 1975
No. 75-447

THE CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

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CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

The petitioner prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Ohio rendered on the eleventh day of June, 1975, in the case of *The City of Cleveland, Appellant v. Public Utilities Commission of Ohio, Appellee, and Cleveland Electric Illuminating Company, Intervening Appellee*, which was an appeal from the Public Utilities Commission of Ohio (hereinafter referred to as "Commission").

OPINIONS BELOW

The Commission through its "Opinion and Order" of November 28, 1973, in Case No. 71-634-Y, set the profit which the Cleveland Electric Illuminating Company could earn on both its intrastate and interstate electric energy business. The *Opinion and Order* is attached hereto as Appendix A. The Commission in its "Entry" of January 18, 1974, approved intrastate rate increases which yielded the total profit allowed by the *Opinion and Order*. The *Entry* is attached hereto as Appendix B.

The opinion of the Supreme Court of the State of Ohio affirming the decision of the Commission relative to the interstate Commerce issue raised by this petition is attached hereto as Appendix C. The Court's Opinion was reported and cited as *Cleveland Electric Illuminating Co. v. Public Utilities Commission* (1975), 42 Ohio St. 2d 403, 330 N.E. 2d 1.

The Supreme Court of Ohio did reverse the Commission on a number of matters unrelated to the one presented herein. The decision of the Commission disposing of said unrelated matters is attached hereto as Appendix D.

JURISDICTION

Petitioner seeks a review by this Court of the judgment of the Supreme Court of Ohio of June 11, 1975, which is attached hereto as Appendix E. The time of the entry thereof was June 11, 1975. The City of Cleveland's request for a rehearing was denied by the Supreme Court of Ohio on June 24, 1975; the denial is attached hereto as Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3). The Supreme Court of the United States has rendered many decisions adjudicating the powers of the various states relative to interstate commerce; this petition likewise invokes this Court's jurisdiction to determine the lawfulness of Ohio's powers over interstate commerce as stated below. The closest case on the facts and issue raised herein is *Public Utilities Commission of Rhode Island, et al. v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927).

QUESTION PRESENTED

The fundamental question of extreme national importance raised by this petition is:

> Does a state regulatory body have the power to set the profit which a public utility may earn on its sales and trades of electric energy that are in interstate commerce?

CONSTITUTIONAL PROVISION INVOLVED

No statutes are involved. The only Constitutional provision involved is Clause 3 of Section 8 of Article I of the United States Constitution which gives Congress the power

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

STATEMENT OF THE CASE

The Interstate Commerce Issue

This case had its origin in an application by the Cleveland Electric Illuminating Company (hereinafter referred to as "CEI") before the Commission for an increase in its intrastate electric rates. The Commission followed standard rate setting practices in allowing rate increases designed to yield an approved overall rate of return upon the Commission's determination of the value of the rate base.

The Commission erred in the application of said practices by failing to subtract from the rate base any of the plant servicing CEI's sales of electricity under Federal Power Commission rate schedules to other electric utilities operating both inside and outside of Ohio. The Commission further erred by failing to separate out of the case the revenues and expenses of this interstate commerce.

The necessity for such allocations has been explained by this Court in numerous decisions interpreting the Commerce Clause (Clause 3 of Section 8 of Article I of the United States Constitution). In many of those cases it was held that such separations were required to prevent a state from either imposing a burden upon interstate commerce or causing intrastate business to subsidize interstate business. The leading cases in point are *The Minnesota Rate Cases*, 230 U.S. 352 (1912), and *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133 (1930). In *The Minnesota Rate Cases, supra*, the United States Supreme Court at page 435 said:

> "Where the business of the carrier is both interstate and intrastate, the question whether a scheme of max-

> imum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the *Smyth Case* (id., p. 541). The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, *on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.* (Emphasis added)
>
> In the present cases, the necessity of this segregation of the domestic business in determining values and results of operation, was recognized by both parties. . ."

The Court at page 461 also held that:

> "When rates are in controversy, it would seem necessary to find a basis for division of the total value of the property, independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business, that proportion of the total value of the property which will correspond to the extent of its employment in that business. . ."

In *Smith v. Illinois Bell Telephone Company, supra*, at page 148 the United States Supreme Court said that an allocation between intrastate and interstate business ". . . is essential to the appropriate recognition of the comparable government authority in each field of regulation. . ."

Both the Commission and the Ohio Supreme Court seem to have dismissed the necessity for allocations by assuming that the relative size of CEI's interstate commerce was insignificant. During the test year (1971) employed by the Commission about six percent of CEI's total deliveries of electricity were sales to other electric utilities made pursuant to Federal Power Commission rate schedules as listed below:

Customer	Percent of Total Deliveries
Cleveland Department of Public Utilities	0.7
Privately-Owned Ohio Electric Utilities	3.3
Pennsylvania, New Jersey, and Maryland Electric Utilities	2.0
Total as % of total CEI deliveries	6.0%

It should be noted at this point that the Supreme Court of the United States required allocations in *Public Utilities Commission of Rhode Island, et al. v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), when less than three percent of the company's deliveries were to another electric utility.

The *Attleboro* case, *supra*, also determined that sales of electricity made by an electric utility in one state to an electric utility in another state are in interstate commerce. That CEI's sales to other Ohio electric utilities are also in interstate commerce is established by their being made under Federal Power Commission rate schedules; in any event, these sales are regulated by federal authority, which by this Court's holding at page 148 of

Smith v. Illinois Bell, supra, precludes the exercise of state authority over the earnings that may be made thereon. The interstate nature of these sales has not been disputed before or by either the Commission or the Supreme Court of the State of Ohio.

Another fourteen percent of CEI's 1971 deliveries of electricity were trades of power with other electric utilities called "Interchange Power". Under these barter arrangements the recipient agrees to return back at some unfixed time the same volume of electricity as he receives from the sender. These trades of power occur both within and over Ohio's borders.

Cleveland contends that the Commerce Clause of the United States Constitution extends to these trades of power as it obviously does to sales of electricity made under Federal Power Commission rate schedules. These barter arrangements present a novel problem of great national importance since most and possibly all of this nation's major electric utilities are interconnected and trade huge volumes of electricity throughout the continental United States on a daily basis.

The above mentioned sales and trades of power amounted during 1971 to twenty percent of CEI's total deliveries of electricity. The data in support of this is attached hereto as Appendix G.

The Interstate Commerce Issue Was Timely Raised

Cleveland introduced Appendix G into evidence during the hearings before the Commission to demonstrate the size of the Company's interstate business and therefore the necessity for allocations. Cleveland also extensively argued the need for allocations before the Commission. Appendix H is an example hereof.

The Commission on Page 1 of its *Opinion and Order* (Appendix A) refused to either order or make the required separations. The issue was properly raised before the Supreme Court of Ohio as evidenced by that Court's brief discussion thereof at pages 423-4 of its Opinion (42 Ohio St. 2d and Appendix C).

REASONS FOR GRANTING THE WRIT

I. THE COMMISSION HAS ACTED CONTRARY TO THE HOLDINGS OF THIS COURT IN THE MINNESOTA RATE CASES, 230 U.S. 352 (1912), AND SMITH V. ILLINOIS BELL TELEPHONE COMPANY, 282 U.S. 133 (1930).

This Court in the above-mentioned cases determined that in a utility rate case it is necessary to separate that segment of business which is subject to federal authority from that which properly falls under state control. The Public Utilities Commission of Ohio has run afoul of this Court's holdings in said cases by refusing to make such allocations.

The Commission in failing to follow this Court's holdings has in reality ousted the Federal Power Commission from control over the profit which CEI could earn over its sales to other electric utilities. The determination of that profit is the *sine qua non* of the utility rate making process as recognized by this Court in the above cases. It follows as the night must succeed the day that when the Public Utilites Commission of Ohio adds to or subtracts from the profit set by the Federal Power Commission for sales made by CEI to other electric utilities, it is the Public Utilities Commission of Ohio and not the Federal Power Commission which has set that profit.

This Court should grant our petition in order to sustain the federal authority under the Commerce Clause which has been exercised by the Federal Power Commission. If this Court refuses to do so then its holdings in *The Minnesota Rate Cases* and *Illinois Bell* are without practical meaning in Ohio.

II. THE QUESTION OF WHETHER OR NOT TRADES OF "INTERCHANGE POWER" ARE INTERSTATE COMMERCE AND SHOULD THEREFORE BE THE SUBJECT OF SEPARATIONS AS ARE SALES IS A MATTER OF EXTREME NATIONAL IMPORTANCE WHICH HAS NEVER BEEN DECIDED BY THIS COURT.

The volume of trades of electricity between electric utilities dwarfs the volume of their sales to each other. In view of the magnitude of these trades and their growing importance it would be unwise to defer the question of whether or not this Court's holdings in *The Minnesota Rate Cases* and *Smith v. Illinois Bell Telephone Company* should be extended to cover said trades.

CONCLUSION

Wherefore, the petitioner prays that a writ of certiorari directed to the Supreme Court of the State of Ohio be issued under the seal of this Honorable Court in this cause and that upon such review the judgment of the Supreme Court of Ohio, entered on the eleventh day of June, 1975, be vacated, reversed, and set aside and that this case be remanded to the Supreme Court

of Ohio with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

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APPENDIX A

Opinion and Order of the Public Utilities Commission of Ohio

(Dated November 28, 1973)

Case No. 71-634-Y

Before

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY FOR AUTHORITY TO AMEND AND TO INCREASE ITS FILED SCHEDULES FOR FIXING RATES AND CHARGES FOR ELECTRIC SERVICE.

OPINION AND ORDER

The Commission, coming now to consider the above-entitled application, the Secretary's Report of Investigation issued pursuant to Section 4909.19 Revised Code; having appointed its Attorney Examiner, Lewis Winarsky pursuant to Section 4901.18 to assist Commissioner Sally W. Bloomfield in conducting the public hearing; the testimony and exhibits introduced at public hearings held between June 26, 1973 and August 21, 1973; and being otherwise fully advised in these premises; and in compliance with Section 4903.09 Revised Code, hereby renders its opinion and order.

HISTORY OF THE PROCEEDINGS:

Applicant, The Cleveland Electric Illuminating Company (herein CEI), is an Ohio public utility corporation

subject to the jurisdiction of the Commission under Section 4905.03 Revised Code. It is engaged in the business of generating and supplying electric energy primarily to the counties of Cuyahoga, Lake, Ashtabula, Geauga, and Lorain and to a limited extent in the counties of Summit, Turnville, Medina, and Portage in the State of Ohio. The applicant has applied to amend all of the electric rate schedules of the company by (a) increasing the rates under such rate schedules; (b) elimination of six existing rate schedules; (c) extension of the ceilings for general commercial schedules from twenty kw to thirty kw; (d) modification of seasonal rate schedules; and (e) increasing the base of the fuel adjustment clause. Additionally, applicant requested approval of its reorganization of its general rules and regulations. All of the more of 660,000 customers of the Cleveland Electric Illuminating Company are affected by this proceeding.

The above-entitled application was filed on October 7, 1971, and amended on March 1, 1972 with appropriate exhibits, and a motion (a) for approval of legal notice; (b) for fixing June 30, 1971 as the date certain for valuation; (c) for fixing the twelve months ending December 31, 1971 as the test year. On April 10, 1972, the Commission approved the applicant's motion.

On March 3, 1973, the staff filed the Secretary's Report of Investigation (herein S.R.); it was served upon the mayors of the municipalities and the county prosecuting attorneys in the area affected by this application. A number of parties have, upon request, been granted leave to intervene in the proceeding.

The applicant and a number of intervenors having filed objections within 30 days following the issuing of the Secretary's Report of Investigation, the Commission on May

7, 1973, issued an entry assigning this matter for public hearing to begin on June 26, 1973, as provided by Section 4909.19 Revised Code.

APPEARANCES:

Messrs. Alan D. Wright and Harry G. Fitzgerald, Jr., 1010 Euclid Avenue, Cleveland, Ohio, and Squire, Sanders & Dempsey, by Messrs. John Lansdale, Jr., Alan P. Buchmann, and James H. Woodring, 1800 Union Commerce Building, Cleveland, Ohio, on behalf of the Applicant.

Messrs. Robert D. Hart, James L. Harkins, Jr., and William Schatz, 204 City Hall, Cleveland, Ohio, on behalf of the City of Cleveland, Intervenor.

Mr. Lawrence V. Cox, Director of Law, 6161 Engle Road, Brook Park, Ohio, on behalf of the City of Brook Park, Intervenor.

Messrs. Weston, Hurd, Fallon, Sullivan & Paisley, by Mr. Jerome S. Kalur, 25th Floor, Terminal Tower, Cleveland, Ohio, on behalf of the Sierra Club, Intervenor.

Messrs. Thompson, Hine & Flory, by Messrs. William H. Wallace and Alan R. Lepene, Special Counsel, 1100 National City Bank Building, Cleveland, Ohio, on behalf of the City of Rocky River, Intervenor.

Ms. Daisy G. Collins, 1404 East Ninth Street, Cleveland, Ohio, on behalf of The Greater Cleveland Welfare Rights Organization, Inc., Intervenor.

Mr. Patrick A. Gareau, Director of Law, 21330 Center Ridge Drive, Rocky River, Ohio, and Mr. Gerald P. Wadkowski, Special Counsel, 85 East Gay Street, Columbus, Ohio, on behalf of the Cities of Westlake and Strongsville, Intervenors.

Honorable George E. Mastics, Ohio House of Representatives, 1001 Terminal Tower, Cleveland, Ohio, on his own behalf and on behalf of his electoral district, Intervenors.

Mr. William J. Brown, Attorney General of the State of Ohio, by Mr. Walter E. Carson and Mrs. Cheryl H. Keith, Assistant Attorneys General, 111 North High Street, Columbus, Ohio, on behalf of the staff of the Public Utilities Commission of Ohio.

I. RATE BASE

The applicant, CEI, submitted exhibits and testimony in support of its valuation of property actually used and useful in the rendition of electric service within its application area as of June 30, 1970. The reproduction cost new less depreciation of such property as estimated by the applicant may be summarized as follows (S.R. p. 19):

Reproduction Cost New	$1,551,885,000
Less Existing Depreciation (23 percent)	356,990,000
Reproduction Cost New Less Depreciation	$1,194,895,000

The following estimates of the value of applicant's property actually used and useful in the rendering of electric service within the area covered by this application as of June 31, 1970 were obtained by the independent investigation of the Commission's staff (S.R. p. 19):

Reproduction Cost New	$1,499,707,000
Less Existing Depreciation (24 percent)	368,212,000
Reproduction Cost New Less Depreciation	$1,131,495,000

The intervenor, City of Cleveland (herein Cleveland) submitted testimony and an exhibit which estimated the applicant's reconstruction cost new less depreciation to be $1,075,487,000.

The differences between the above valuations will be discussed below under the appropriate subdivisions.

Land

The Commission staff's method of calculating the contribution of land and land rights to the rate base differs substantially from that proposed by the applicant and Cleveland; therefore the parties estimated significantly different valuations:

Applicant	$63,024,000
Staff	40,476,000
City of Cleveland	27,676,506

The Commission's staff arrived at a value for land held in fee by making reference to available tax appraisals of all such land held by the applicant. The appraisal figure was then divided by an appropriate translation factor, determined by the common level of assessment in the county, in order to arrive at a market value as of the end of the taxing year. A second adjustment was made to allow consideration of the increase in value from the year of tax appraisal to the date certain. Direct testimony in support of the staff land value revealed that the taxing authorities who originally appraised the parcels were obligated to make their valuation in a manner consistent with Section 4909.05(B) Revised Code (R. p. 1526).

The applicant instructed its real estate consultants to make their appraisals subject to the following conditions:

1. In making the appraisals, the value of each site was to be compared with the value of contiguous and neighboring parcels of land and lands of similar character as to location and use, and these values were to be used in establishing the fair market value of the land and land rights of the site property as of June 30, 1971.

2. In determining the fair market value of the lands and land rights, title costs, site preparation and other overheads ordinarily paid by the purchaser of land were not to be included in the valuation. The site property was to be appraised as vacant land, ignoring buildings or other improvements located on the parcels (R. p. 660; App. Ex. 27, p. 647).

Applicant's appraisers gathered information about the property, its location, its shape, the character of the neighborhood, zoning, utilities, condition, type and similar real estate factors. They then accumulated sales data from courthouse records, interviews with buyers and sellers and reference to Osterdorf-Morris Company records. An opinion was then formulated, based on the compiled information, as to the fair market value of the property (App. Ex. 27, p. 9). Wherever possible, only sales made within three years of the date certain were considered.

Cleveland estimated the value of lands held in fee by making a sampling of CEI comparables. Inspections were conducted of lands which the applicant's appraisers deemed to be similar to applicant's sites and testimony was submitted by Mr. Canitia stating that CEI's estimation of land contribution to rate base was overstated by 20%. Cleveland, while contesting the implementation of the comparable sales approach on the part of the applicant, did

not challenge the propriety of the method used in making rate base valuations of land (App. Ex. 35).

Considering the evidence before us (App. Ex. 4, Vols. 1-4), we find that the substantial data and testimony submitted by the applicant is the most convincing with the exception given below. The testimony of both real estate appraisers was not impeached in any material respect although both were cross-examined extensively.

(a) *Lake Shore*

Applicant's land valuation for Lake Shore property, 43.4787 (R. p. 673) was estimated at $3,700,000 (R. p. 677) approximately five acres of the total is artificially filled land (CEI brief, p. 24). Applicant's 1972 Annual Report notes that "title to the artifically filled land . . . is in the State of Ohio" (Cleve. Ex. 35, p. 38). Although CEI's exercise of its property rights is undisturbed under this arrangement, CEI does not assert title as such. In our opinion Section 4909.18 Revised Code does not permit us to include land not *owned* by applicant for rate base purposes. Therefore, the valuation for Lake Shore land should be reduced by 11.3% or $418,000 making a total valuation for Lake Shore land of $3,281,900.

(b) *Seneca Plant*

The briefs of the staff and Cleveland arguing that the Seneca Plant should be excluded from the rate base because it is not located in Ohio cite Section 4905.05 Revised Code which gives the Commission jurisdiction over public utilities with plant or property lying wholly within the state. However, Section 4909.18 Revised Code permits applicant to submit a valuation "of its property used and useful in rendering the service referred to in such application." Employing the principle of construing statutes in pari materiale, we can find that the Seneca Plant should

be included because indisputably it is used and useful in rendering the service referred to in the application. However, it is another question, not presented here, whether the Commission would have authority to set safety standards for a plant not located in Ohio pursuant to its jurisdiction under Section 4905.05 Revised Code.

LAND RIGHTS

In dealing with valuation of land rights, the Commission's staff simply evaluated the varying easements and licenses held by applicant at their original cost, claiming that no acceptable method is available to adjust the value of the land rights either up or down. As noted in the Secretary's Report (p. 24), such a method has been found proper in Case No. 3307 (Ohio Bell, reversed on other grounds, 301 U.S. 292, 1934).

The applicant's method of valuation for land rights is similar to its appraisal for land held in fee, with an additional allocation being made to obtain the fair market value of the easement vis a vis the serviant interest. Applicant claims such an allocation is based on the relative use available to each party. Applicant's consultants also considered damages resulting from the taking by easement expressed as the measure by which the full enjoyment of one's property is impaired by the presence of an attaching interest. Because of the extensive nature of the rights-of-ways involved, the applicant made random samplings of the land rights rather than a full observation of all the properties. Additionally, applicant computed a plottage value; the increment of value resulting from the accumulation of two or more parcels of land measured by the market activity of similar property (App. Ex. 26, 12). The applicant suggested that the plottage value of its easements is generally 10% of the otherwise appraised values.

In intervenor Cleveland's opinion the valuation of the applicant's properties should not include any amount for damages and plottage, further, that easements and licenses should not be valued (Cleve. brief, pp. 10-17). Cleveland suggests that if any value for incorporal rights be included, it be minimal; the intervenor argued that licenses should be valued at original cost.

Witness Chisling employed the same cost trend technique (App. Ex. 26, p. 19) in this case as in Ohio Power (Case No. 71-283-Y issued October 23, 1973; he chose this method of applying trend factors to original cost because "a parcel by parcel appraisal would be extremely costly and time consuming (App. Ex. 26, p. 19). As we noted in *Ohio Power*, supra, an argument exists as to whether land rights are to be valued in the same manner as land under the provisions of Section 4909.05 (A) (B) and (C). Leaving that aside for the moment, and assuming market value were an appropriate measure for valuing land rights, two other problems remain. First, applicant's trending method clearly does not comply with the appraisal method set forth in Section 4909.05(A) and especially (B) and (C). Secondly, the method assumes that there is a market value for the kinds of land rights held by applicant when in fact there may be no actual or real market value since there are very few if any buyers of this type of property. Therefore, in the absence of a verifiable method of assuring that there is a market value for applicant's rights-of-way and noting additionally that the trending method does not comply with Section 4909.05 Revised Code, the Commission finds that original cost of land rights is proper method for this proceeding. The plottage issue becomes moot by virtue of the discussion and determination above.

In summary, we find for purposes of this proceeding applicant's land valuation of $20,503,500 (App. Ex. 10, p. 2) less the $418,100 or $20,085,400 plus the original cost of rights of way of $17,003,781 or a total of $37,089,181 for land and land rights is the proper valuation.

ALL PHYSICAL PROPERTY OTHER THAN LAND

The applicant estimated reproduction cost new for its properties by applying price trends to the actual cost of surviving assets (App. Ex. 28, pp. iii). These cost trends represent a mathematical method showing the variation in price for a given commodity or property over a period of years. With the exception of the steam production property, the staff accepted applicant's trends. In adjusting applicant's reproduction cost new figures, Cleveland also utilized applicant's trends (Cleve. Ex. 32, Part V, p. 2).

Applicant included local labor rates and local material costs in formulating cost data. Data was also applied in accordance with a hypothesis of single-impulse construction, whereby CEI experts made computations assuming that repairs and improvements were made in a continuous program utilizing modern trends under modern working conditions over a relatively limited period of time, rather than by means of a series of minor accretions. This was done by the applicant in the belief that the use of that single-impulse concept promotes economies within the production system and results in a downward adjustment to what would otherwise be the reproduction cost new. A similar adjustment was made for excess stockhandling (App. Ex. pp. 77-78).

Data used by the applicant to compute trends was based where possible on the actual experience of CEI. Where such material was not at hand information from

the Building Trade Employees Association was used, i.e., labor rates and construction materials. Finally, where information was not otherwise available, Jensen, Bowen and Farrell trends were used. These trends were used in this case for the power plant, substation and general equipment accounts, and material portions of the subcontractors' trends in the structures accounts.

The Commission's staff adopted the applicant's developed trend factors for all accounts except steam production (S.R. p. 20). In explaining why the applicant's trend factors were not adopted for steam production, the staff noted that production property work is generally done on a contract basis while other work is generally done with company labor. The staff felt that the Handy-Whitman electric labor index was more characteristic of contract labor than was company generated indicies. Staff witness Gill stated that unless proven wrong, the generalized trend should be used (R. 1600).

Applicant presented witness Gillett, an associate of the firm which publishes the Handy-Whitman trends who testified that the construction of applicant's trends was conducted in such a manner as to produce a more accurate RCN than the generalized regional trends and specifically that the Cleveland construction labor trend diverged sharply from the labor index used for the North Central region, and in his opinion the specialized trends were more accurate (App. Ex. 39, pp. 4, 9). This testimony remained unimpeached after cross-examination. Cleveland's witness Marquart added an adjustment of $2,107,000 representing a "computation of additional distribution plant investment for new customers per sales level normalization" (Cleve. Ex. 32, Part V, Sched. 1 and 7). However, the rationale therefor was not clear (Part V, p. 5). Therefore, for purposes of this case, we find that applicant's RCN valuation of $1,488,861,000 to be appropriate.

(a) *Standby Equipment*

Cleveland questioned witnesses at length as to the standby nature of coal equipment held in various inventory accounts. Basically they argued that standby coal equipment should be excluded from the rate base as not being "used and useful for the service and convenience of the public." The Commission takes administrative notice of the conflicting federal policies with respect to coal fired plants. On the one hand the Federal Environmental Protection Agency (EPA) has in effect ordered them out of service. On the other hand, the President of the United States has urged delay of changeovers from coal to oil fired equipment and in fact federal legislation requiring change back to coal during the energy crisis is currently under active consideration by congress. In view of the confused situation and in light of the very real probability that coal operations may resume, we find the standby equipment to be a proper item for the purposes of this proceeding.

(b) *Street Lighting Plant*

Neither the Commission staff nor the applicant have made allocations of costs or values of property associated with street lighting services provided by the applicant. Cleveland, however, in its first objection to the Secretary's Report claims the report understates the percentage of sales revenues derived from street lighting activities and claims that millions of dollars of company property are properly allocable to street lighting and signal services being provided to municipalities pursuant to contracts between the applicant and the respective cities.

However, both staff and applicant have adjusted for the plant devoted to street lighting by including the revenues therefrom (S.R. p. 18). The staff found that a sample

allocation indicated no measurable effect upon the rate of return and therefore an extended allocation was not justified for street lighting sales and sales to other public utilities (S.R. p. 23). While Cleveland disputed this judgment, it presented no evidence to substantiate its first objection. Therefore it is overruled.

(c) *CAPCO Rules*

Cleveland argues in its third objection to the Secretary's Report that costs associated with the production of power transferred to CAPCO, as interstate entity should be excluded from the rate base. It is argued that these funds and additional costs interchange of power are under the exclusive jurisdiction of the Federal Power Commission. It should be noted that Cleveland witness Marquart did not include such an adjustment (Cleve. Ex. 32, Part V. Sched. 1). The applicant asserts that CAPCO is not an entity, neither interstate nor intrastate. As viewed by CEI, CAPCO represents only certain agreements for the interchange of electric power and the sharing of the ownership of facilities, thus to exclude facilities because they are involved in interchange agreements would be conceptually incorrect (R. p. 2605). The Commission must draw the same conclusion with respect to this contention as it did for street lighting issue above and overrules Cleveland's third objection.

(d) *Seneca Plant*

The contention is made by Cleveland in its fourth objection to the Secretary's Report, that the Commission staff has erroneously included in rate base valuation $52,930,000 attributable to the Seneca Plant located in Pennsylvania. This issue has been discussed and determined under the caption "land" above.

DEPRECIATION

Applicant secured the consulting services of two appraisers to calculate depreciation (App. Ex. 29, p. 1) who testified that they took into account all factors relating to the ultimate retirement of the property, i.e., mechanical depreciation, age, obsolescence, lack of utility and requirements of public authority (App. Ex. 29, p. 1). CEI attributed depreciation due to obsolescence upon the difference between the the condition of an existing item of property with a new item of the same property. In this way the applicant computed a "functional depreciation" to represent the value of each of the applicant's plants as a function of its operating efficiency and construction costs relative to a new and modern plant (App. Ex. 29, p. 16). To represent a new and modern plant, the applicant chose a 325,000 KW net capacity unit because it was considered the size most consistent with the CEI's production requirement alone (App. Ex. 29, p. 21).

To determine physical depreciation, applicant's witness Christensen inspected three units, reviewed the company records and consulted with personnel. The applicant expressed the view that because the physical condition of most elements of a power plant has a direct bearing on its efficiency, the functional condition found by the study would reflect without further adjustment the physical condition of the operating elements of the plant in addition to obsolescence (App. Ex. 29, pp. 26, 27). Inspection was made of all other properties except when working with the mass accounts or where such a method was impractical (i.e., Account 362.30 Station Equipment—Customer Locations). Observations were scaled by classification as "excellent", "good", "fair", etc., each classification having a corresponding numerical value. The individual percent conditions were then weighted according to the amount

of property in each classification, in order to arrive at a weighted average percent condition for each structure, each location for substation equipment and for each of the mass accounts. Individual percent of conditions were carried in a summary sheet and the percent condition of the entire structure was obtained by weighting the percentage of condition for each component in accordance with its relationship to the whole structure. The applicant assumed overall percentage conditions for the whole unit in dealing with smaller items such as outlying distribution substations rather than making a detailed appraisal. A further adjustment was subtracted from the value of these assets for depreciation arising from obsolescence and other non-physical depreciation (App. Ex. 29, pp. 5-34).

Transformers, regulators and circuit breakers were also depreciated by similar methods (App. Ex. 29, pp. 35-56).

The Secretary's Report divided consideration of depreciation into two areas of discussion: production equipment and all other property.

In evaluating all of the company's generating stations, inspections were made to determine the amount of physical deterioration. Percent conditions were established for the various units inspected and calculated for the total accounts. Additional depreciation was estimated for such equipment by comparative analysis of the actual given age, the system size and growth rate, and the unit installed cost of the machinery used by the applicant with the larger, more modern units in use at electric power generators installed in recent years. In making the assessment of non-physical depreciation, a model of 510 MW units was used. The Commission's staff deemed this size appropriate due to growth of the electric production system

used by the applicant. Commission staff attributed approximately 70% of the depreciation suffered to the reproduction cost new value to these factors, the balance being attributed to physical deterioration. The total condition of the production accounts was estimated as the produce of the condition as a result of obsolescence taken times the condition as a result of mechanical deterioration.

The Commission's staff made random sampling inspections to estimate the effects of mechanical deterioration on property not used for generating electricity. The percent condition of the random sample was deemed to be an average for the system for a given account and was applied to the system's RCN values. In addition, the Commission staff attempted to analyze other forms of depreciation which contribute to an overall shorter life than would be the case if only mechanical deterioration was considered. Where the life of property as given by the company is considered consistent with a reasonable physical life no adjustments were made (S.R. p. 22).

While the differences in depreciation between a Commission staff and the applicant were relatively insubstantial (R. p. 1497), Cleveland asserted that 1) condition ratings attributed by the Commission's staff to production equipment is grossly overstated and 2) depreciation for rate base should be determined by actuarial methods. Cleveland submitted a depreciation valuation for production plants $92,505,000 greater than that suggested by the applicant (Cleve. Ex. 32, Part 5, p. 5).

However, actuarial methods do not necessarily conform to the requirements of Section 4909.05(E) and in the instant case, Cleveland did not present evidence to show that its estimate did fulfill those requirements. Cleveland also presented testimony to support its contention that a 650

MW unit was appropriate because applicant had one in use during the test year (Avon #9) and planned to operate four more of at least 650 MW capacity in conjunction with CAPCO associates, countered that CEI's choice of two 325 MW models was predicated upon its assumption that CEI should be viewed as an isolated system, ignoring the advantages of interconnection with other utilities (Cleve. brief, p. 39).

Testimony in support of the staff's contention of its 510 MW model was not enlightening in explaining the components of the model nor the reason underlying the choice (R. pp. 1519-1522). The Commission basically agrees with the contention of Cleveland that CEI's system should not be viewed in isolation and that any model should approximate as nearly as possible CEI's actual joint operation with other utilities of large plants. However, witness Parrott's testimony was unconvincing with respect to the proper depreciation. While we might prefer a 650 MW model, the applicant's use of two 325 MW models was not unreasonable and in view of all the testimony in this case, is the best supported method on the record.

With respect to depreciation other than steam plant, we find the staff's estimate (S.R. pp. 28-30) to be appropriate for purposes of this proceeding.

WORKING CAPITAL

The Commission's staff recommended that the allowance for working capital should total $20,571,433, while the applicant set forth its minimum working capital as $39,064,472 (App. Ex. 1, p. 3). The City of Cleveland suggested working capital of $2,798,000 (Cleve. Ex. 32, Part V, Sched. 1).

The major differences between the calculations of the applicant and the staff with respect to the allowance for

working capital arises from the treatment of 1) an allowance for a materials and supplies inventory held for capital accounts and 2) an allowance for working capital to maintain an adequate inventory of fuel. The staff opined that materials and supplies held for capital accounts are not an appropriate part of the rate base and therefore should be excluded and therefore reduced the applicant's $8,846,000 figure for materials and supplies to $1,858,000 (S.R. pp. 24, 25). The applicant argued that all of the $8,845,651 of inventory should be included in computing working capital. With respect to the allowance maintaining an adequate inventory of fuel, the applicant's value of $14,280,150 is based on the amount on hand and in transit on the date certain (App. Ex. 19, p. 5). The staff looked to an estimate of the average fuel on hand during the 12 month period, in recommending a supply valuation of $10,753,000 (S.R. p. 25).

Cleveland agreed with the staff that adjustments to working capital for coal inventory and materials and supplies should be computed on a test year average basis. Beginning with applicant's book figures for cash allowance, materials and supplies account and the fuel inventory of $39,001,763 Cleveland deducted $34,346,000 (Cleve. Ex. 35, Part 5, Sched. 6) representing an estimate of balances as of the date certain, accruals for property and federal income tax, accruals for possible deficiency tax payments, accumulated deferred credits and customer contributions, and adjustments to place coal inventory and materials and supplies on an average test year basis (Cleve. Ex. 35, Part 5, pp. 3-5, Scheds. 3 and 4). Cleveland's estimate for working capital thus totalled $2,798,000 (Cleve. Ex. 5, Sched. 1).

While the Commission recognizes that working capital may be computed in a variety of ways, under the evidence

presented in this case, we see no reason to deviate from our established policy. A number of items which Cleveland has deducted from working capital have been considered by the staff and will be discussed below.

The applicant objects to the deduction of accrued taxes as an offset to working capital. However, the Ohio Supreme Court in *Cincinnati v. PUC*, 161 Ohio St. 406, reasoned that since such advance payments are available for current use until they become payable to the taxing authorities, there is no need to allow earnings upon a cash balance without regard to the accruals. If no offset is made, a duplication in charges to the taxpayer will result. The court stated (at p. 406):

> ". . . customer contributions in the form of accruals . . . for the payment of taxes to be paid by the applicant at future dates, which will be consistent with reasonable certainty in the foreseeable future and which are available for working capital and for investment in materials and supplies, should be used to offset the allowances for working capital."

Therefore the Commission's staff, as noted above, excluded approximately $7,000,000 from the working capital accounts in materials held for capital accounts. The staff found that 79% of applicant's materials and supplies were properly classified as being within capital accounts (S.R. p. 25). The applicant contends that an exclusion of capital accounts is improper. The Commission does not agree. Exclusion of materials and supplies to be capitalized is not only relevant and proper but necessary in any computation of working capital. (See discussion in *Northern Ohio Telephone Company*, Case No. 71-439-Y issued August 2, 1973 citing Ohio Supreme Court decisions).

As indicated above, CEI and staff computed different fuel allowances because the applicant based its computations upon the amount on hand and in transit on June 30, 1971, whereas the staff used the average on hand during the 12 month test period (S.R. p. 25). The actual experience under normal circumstances of the applicant during the test year is the most reasonable guide for the calculation of this working capital component. Therefore, we find the staff allowance to be proper. The fact that the applicant suffered a strike during the latter months of the test year does not make the Commission staff's figure any less reasonable.

The rate base as we have determined from the foregoing is $1,175,870 as indicated by the table below:

Land and land rights	$ 37,089	(000's)
RCNLD of property	1,118,210	
Working capital	20,571	
Rate Base	$1,175,870	

In summary, the Commission is of the opinion and so finds that the staff's computation of working capital and its components is both reasonable and proper and thereby overrules applicant's objections related thereto.

II. REVENUES AND EXPENSES

The applicant submitted exhibits and testimony in support of its revenues, expenses (including taxes) and income available for fixed charges, dividends, and retained earnings for the period, January 1, 1971 to December 31, 1971, the test period in this proceeding, adjusted to reflect the full annual effect of changed conditions as follows (App. Ex. 2, p. 1):

Total Operating Revenues	$267,348,942
Operating Expenses	
Operation and maintenance	134,105,361
Depreciation	25,100,907
Total Taxes	50,283,956
Total Expenses	(209,490,224)
Return	$ 57,858,718

The staff investigation resulted in the following (S.R. p. 8):

Total Operating Revenues	$268,930,886
Operating Expenses	
Operation and maintenance	136,564,705
Depreciation	25,127,015
Gain from property sale	(59,656)
Total Taxes	47,669,888
Total Expenses	(209,301,952)
Return	$ 59,628,934

The above amounts reflect numerous adjustments made by the Commission's staff regarding revenues, expenses, and miscellaneous deductions from income (noted on substitute amended p. 8, detailed on pp. 9-11 of the S.R.).

REVENUES

Cleveland suggests in its sixty-second objection to the Secretary's Report that the Commission's staff has erred in its projection of future revenues claiming that an adjustment to test year results is necessary to provide a normal

balance of past revenues and costs for rate setting revenues. Cleveland alleges a more reasonable projection would adjust for the low level of sales in 1971 by increasing the projected sales for the following year by $10,000,000 per year. The Commission staff found the total revenues from electric service in recent years to be (S.R. p. 13):

1968	200,258,168
1969	214,867,157
1970	241,626,628
1971	266,574,886
1972	287,775,250

Cleveland selected for purposes of normalization of revenues, the compound growth rate from 1960 through 1970 (R. p. 3359). The estimate of compound growth rate was 6.4 percent, the same percentage reported in the company's annual report for 1971. Cleveland also alleges, that on the basis of having obtained from the Federal Power Commission the applicant's monthly reports, an inference can be drawn that the rate of growth in fact exceeds the 6.4 annual rate of growth level (R. p. 3362).

The issue of proper normalization was addressed by the briefs of applicant, staff and Cleveland. Whereas the intervenor's brief focused upon the mechanics of the adjustment to be made for the normalization of revenues in the test year, the staff's and applicant's briefs argued against the theory of allowing any sort of adjustment for normalization of revenues in the test year. The basic argument relied upon by the staff and the applicant is that, in setting rates, the Commission is to look at the test year. Certain adjustments can be made to revenues and expenses for the test year, as in the case of wage increases which occurred during the test year. However,

both of these parties believed that an adjustment for lack of growth due to poor economic conditions would be so uncertain as to be undeserving of recognition. A wage increase is a positive known fact. However, what might have been, if economic conditions were different, is not definitely known. Although past years can be referred to, the information which these past years reveal cannot be molded into a definite pattern for the future. Therefore this Commission overrules Cleveland's proposals for adjusting for "growth rate."

Approximately $116,000 has been included in the revenues of CEI for funds received by the applicant during the test year from insurance companies arising from policies held by CEI. The Commission's staff suggests that the receipt of insurance proceeds is a regular occurrence from one year to the next and therefore the monies should be included in the revenue of the year in which payment is actually made by the insurer. The applicant contends that the over one hundred thousand dollars in proceeds bore no relevancy to the year 1971, except that the funds were received during that year. CEI asserts that while the collection of insurance proceeds was not an infrequent activity such collections were not made on what it considered a consistent regular basis (R. p. 1884).

While we can agree that the amounts of insurance proceeds may vary from year to year, these types of payments are regular enough to justify their inclusion as a revenue item for rate case purposes. Implicit in the testimony of Mr. Thurber is the motion that there is no reasonable way of estimating the proceeds in a given year (T. pp. 1800-01, 3031). In the absence of a letter method for determining the amount of such proceeds for the test year, we find the actual proceeds received during the test year to be reasonable.

The Commission's staff has included in its estimation of revenue $59,656 as "Gain from Sale of Utility Property" (S.R. p. 8). The applicant argues in its eleventh objection to the Secretary's Report that the sale of such property was not of a nature proper for inclusion because it was not revenue derived from service to the public and was not recurring as a part of the company's business operations.

However, the applicant's witness Mr. Kemper implied that the company regularly disposes of various parcels of property as their utility to the company ceases. Moreover, this very property once constituted an item in the rate base when it was used for the service of the public. Therefore it is appropriate that the ratepayers benefit from their sale and find this revenue item proper for purposes of this proceeding.

EXPENSES

(a) *Advertising*

Both Cleveland and the Sierra Club raised objections to expenditures for advertising and promotional activities on the part of the applicant. The Secretary's Report shows such expenses as $1,149,190 for advertising and a total selling expense of $6,381,526 (S.R. p. 16).

Mr. Rudolph, President of CEI, testified on behalf of his company, in support of the applicant's inclusion of advertising and promotional expenses in its application. Mr. Rudolph's testimony addressed primarily the need to have an effective advertising program in order to provide controlled growth in the use of electricity and to sustain a lower cost of service. He also discussed the applicant's efforts in using advertising as a means of balancing patterns of load growth (commonly referred to as selective selling).

The Sierra Club submitted the testimony of four witnesses presenting its assertions relating to advertisement expenditures. The Sierra Club suggested that while the Commission may be unwilling to require the applicant to undertake a negative advertising campaign, it would be justified on economic grounds in requiring Cleveland Electric Illuminating 1) to discontinue promotional advertising, and 2) to redirect the five percent of its operation and maintenance expenses which is currently devoted to demonstrating, selling and advertising activities to activities with greater social purpose. Alternatively, it was suggeste the promotional expenses should be rebated to the consumers through lower rates (Sierra Club Ex. 2).

The Sierra Club, by its witnesses, brings into question the effectiveness of the applicant's advertising efforts in achieving the goals to which Mr. Rudolph addressed his testimony. Questions dealing with the environmental and economic impact on the service area of such advertising were also considered together with the propriety of allowing a monopoly to advertise use of a product which is such an essential part of the day to day life of the northeast Ohio citizen.

In its fortieth objection to the Secretary's Report, Cleveland broadly claims the applicant's advertising is deceptive, excessive, and a violation of the anti-trust laws. Additionally, Cleveland suggested the Commission ought not compensate electric utilities for their promotional practices designed in part to take away business from the natural gas industry.

This Commission is presently considering an action brought by The Ohio Public Interest Action Group, Case No. 72-757-E, directly addressed to general questions relating to advertising and promotional expenses. The issues and considerations discussed by the parties in this applica-

tion are similar to those raised in the complaint proceeding consistent with our decision in *Ohio Power*, Case No. 71-283-Y, issued October 26, 1972, we defer a general policy decision. At this time, the Commission will follow what has been the practice up to this time and include the aforementioned expenses on a cost of service.

(b) *Charitable Contributions*

Mr. Rudolph also testified on the charitable contribution expenditures made by the applicant. The witness testified that the majority of the expenditures were contributions to the Cleveland Electric Illuminating Foundation, a nonprofit corporation established for the purpose of maintaining and applying funds, donated to it by the company for charitable, scientific or educational purposes. The remainder of the charitable contributions were direct contributions to other associations, including the Cleveland Indians Baseball Organization (App. Ex. 24, p. 10). Funds expended for this purpose totalled $636,149 during the test year (App. Ex. 24, p. 11).

The inclusion of charitable contributions as an operating expense was explained by the witness in this way (App. Ex. 24, p. 11, 12):

> "These expenditures should be incorporated in the cost of service in this rate hearing because it is the customer, in the local area, who receives the benefits of these contributions, not the shareholder, who may reside anywhere. These contributions help to develop a more productive citizenry within our service area. If such contributions are not made, then it is the general service area and this company that will be less well off as a result. It is my judgment over the years that the company's program of support for the community programs have contributed substantially to the ability of the company to provide low cost service to its customers."

Staff cross-examination of Mr. Rudolph revealed that funds are paid to the foundation on an annual basis. The grants are irrevocable, however, there is no obligation on the part of the foundation to distribute the entire amount of the annual grant (R. p. 2914). The witness admitted that such contributions do not improve the production or transmission plant of the applicant in any direct manner. While the customer was alleged to have no input as to how the funds were distributed, it was suggested that the control exercised by the shareholders was no better than indirect.

Cleveland asserts in its fifty-fifth objection to the Secretary's Report, that the stockholder, rather than the rate payer, should assume the burden of financing charitable contributions. The contention is also made in the same objection that the contributions made by the applicant in the test period are excessive.

As noted in *Telephone Service Company of Wapakoneta, Ohio*, Case No. 36,681, historically this Commission has not established a clear precedent as to the allowance or disallowance of charitable contributions as an appriate item of expense for rate making purposes. Such donations were disallowed by this Commission as early as 1934 in *East Ohio Gas Company vs. City of Cleveland*, 4 PUR (ns) 433 (1934); In Re *The Springfield Gas Company*, 19 PUR (ns) 1 (1937). Intervening and subsequent Commission history reveals the recognition of such contributions as allowable items of expense *West Ohio Gas Company v. PUCO*, 6 PUR (ns) 449 (1935); *Cleveland Electric Illuminating Company vs. City of Cleveland*, 67 PUR (ns) 65 (1947); *Cincinnati Gas and Electric Company vs. City of Cincinnati*, 74 PUR (ns) 5 (1948); and Re *Ohio*

Bell Telephone Company, 82 PUR (ns) 341 (1949). Since 1950, this Commission, however, has permitted charitable contributions as an offset to operating revenues only when the evidence of record reveals that the expenditure was reasonable, the purpose beneficial to the community and the impact of the allowance on the ratepayer minimal.

Accordingly, the Commission finds that the charitable contributions made by the applicant for purposes of this rate proceeding only are to be disallowed to the extent that it exceeds $300,000 during the test year. Moreover, we hereby signal the industry that we are moving towards a policy decision that charitable contributions should *not* be included at all as an appropriate item for rate base purposes. However, we deem it proper to permit some amount to be included at the present time in this case because we have not given notice to the public of this policy change.

(c) *Miscellaneous Expenses*

CEI has raised a number of other exceptions to the Secretary's Report relating to its claimed expenses pertaining to legal and factual issues contested to varying degrees during the hearing.

The second objection to the Secretary's Report asserts that the Commission's staff has incorrectly reflected on an annual basis the cost of wage increases granted during the test year (R. p. 1879). CEI estimated the expense by comparison of dollars paid immediately before and after the wage adjustment and arrived at a figure of $1,229,000 (R. p. 1879). In estimating the increase the staff applied the cents per hour increase to the hours worked on the payroll immediately preceding the wage adjustment (S.R. p. 5). The difference in estimates submitted by the applicant and Commission's staff is $44,000. While the

methods used by the staff are reasonable under the circumstances as they knew them at the time of the investigation, we find the estimate of cost resulting from wage increases as computed by the applicant to be based on more complete information and therefore adopt CEI's suggested figure as the amount properly includable in the rate base. Additionally, the Commission accepts the objection of the applicant relating to the pension costs arising from the wage increase.

The applicant's fourth objection to the Secretary's Report asserts 1) the Commission's staff has incorrectly determined the base amount for fees and expenses in connection with the rate increase proceedings, 2) the staff has failed to include in applicant's allowable expenses for the test year any amounts for the amortization of rate case expense during the test period, and 3) the staff's recommendation that such expenses be amortized over a five year period is improper. A reading of the Secretary's Report discloses that the staff has, in fact, adopted the estimate of cost submitted by the applicant and that $62,000 has been allocated to the year 1971 for such expenses. Therefore, we overrule applicant's first two objections. We also deem the period of amortization of expenses relating to rate proceedings to be within the discretion of this Commission and find the five year period suggested by the staff to be reasonable, proper, and consistent with recent practice. We therefore, direct such an amortization to be made by the applicant.

CEI's sixth, seventh, and eighth objections relate to F.I.C.A. uncollectable accounts, and real and personal property tax provisions of the Secretary's Report. The applicant's witness Mr. Thurber testified during the hearing that CEI was willing to accept the position of the Commission's staff dealing with these issues (R. p. 1880).

Therefore, consideration of the initial objections need not be made at this time.

The Commission's staff based its estimates of federal income tax expense on tax returns submitted by the applicant for the test year. CEI alleges that such a method is improper under these circumstances (R. p. 2007). It is the position of the applicant that because of its aggressive tax posture the tax applicant charges to such expense for the year adjusted for particular contingencies. The applicant claims a book expense of $13,622,000 for the test year, while the tax shown to be due in the tax filing is somewhat less (R. p. 2010).

The applicant suggests that if the staff is to look to its tax return as a basis for computing income tax expense, an adjustment of one million dollars should be made to reflect deficiency assessments which are probably to become due (R. p. 2007). CEI has, during recent years, established a reserve for such payments which arise from tax audits. During the time period 1960-1969, deficiency assessments averaged $481,000 per year and in the two years last audited the additional amounts paid were over one million dollars (R. p. 2014).

Cleveland asserts that the reserve established by CEI has, in recent years, been larger than is needed and the excess reserve should be amortized over a five-year period in order to return such funds to the benefit of the rate payers (R. p. 3342). Cleveland contends that in order to accurately reflect the position of the applicant, income accounts should be readjusted upward and expense accounts should be lowered by $500,000 (R. p. 3345). Finally, Cleveland suggested by way of oral testimony that an amount of $1,460,000 was a reasonable reserve for settlements in 1970 and 1971 (R. p. 3348). Nevertheless, Cleveland's witness relating to this question does admit that the proper figure for the reserve is a matter of speculation and is indefinite (R. pp. 3351 and 2019).

The Commission finds the staff's use of tax returns submitted by the applicant as a basis for estimating federal income tax expense to be proper. We agree with Cleveland's witness that any figure for a deficiency reserve would be a matter of speculation and conjective and therefore improper. Use of the attached tax return of the applicant will avoid inclusion in the rate base of indefinite amounts for this expense and will allow whatever deficiency payments which may materialize to be included in any future rate application which CEI may file. Therefore, we conclude that the figure submitted by the Commission's staff is to be included as the federal income tax expense.

The applicant objects to the position taken by the Commission's staff in excluding expenses associated with two production outages at the Seneca Plant. The Secretary's Report estimates a total expense attributable to these outages of $215,000, while the testimony produced by the applicant indicates an expense of $202,186 (R. p. 2131). Applicant's witness testified that the outages were caused when tools were left in machines resulting in damages to equipment and delaying continued plant operation (R. p. 1795). The witness testified that similar outages occurred twice in a four month period. It is the position of the Commission's staff that not only are these expenses recoverable through insurance, but more importantly they are of a nonrecurring nature and ideally such costs would arise only with the greatest infrequency. Alternatively, the applicant contends that human error is a recurring experience and has been the direct cause of these outages. CEI's counsel (R. p. 2162) suggests that the fact that

the outages occurred twice in such a short period of time proved that they were recurring and indicated that such negligence-based expenses should be included in the applicant's rate base. The Commission finds this view regrettable and shares the views expressed by the Commission's staff. While it may be agreed as a general proposition that human error is a recurring condition, it is not the policy of this Commission to reward any public utility for careless or negligent conduct. Remissive work habits as led to these outages are contrary to the interest of the consumer public and allowance of expenses of this nature would be inconsistent with the promotion of efficient and workmanlike operations. Therefore, expenses related to the Seneca outages have been excluded from the rate base of CEI.

(d) *Depreciation Accrual Rates*

Following a review of current rates of acrrual used by the company for the determination of depreciation expense and the amount of money accumulated in the depreciation reserve as related to total depreciable book value, the Commission's staff recommended that the applicant's provision for depreciation for 1971, as stated in Applicant's Exhibit 19, of $25,127,015 be accepted. The Commission's staff also recommended that CEI be required to continue use in future years of the same accrual rates as used during the test year.

The applicant, in its eighteenth objection to the Secretary's Report, asserts that for the Commission to determine depreciation rates would be inappropriate, unnecessary and impractical, arguing that appropriate depreciation accrual rates have historically been considered to be a management prerogative (Ex. 37, p. 24).

The staff, consistent with the Commission's responsibility under Section 4905.18 Revised Code, routinely ana-

lyzes depreciation rate accruals in making its investigation pursuant to Section 4909.19 Revised Code. Section 4905.18 Revised Code, provides "the Commission shall ascertain, determine and prescribe what are proper and adequate charges for depreciation of the several classes of property of each public utility."

The propriety of this Commission considering depreciation accrual rates in conjunction with the rate case application has been fully discussed in two recent rate cases, see *Toledo Edison Company,* Case No. 71-148-Y, issued January 31, 1973 and *Northern Ohio Telephone Company,* Case No. 71-439-Y, issued August 2, 1973. Therefore, the Commission overrules the applicant's eighteenth objection and directs the applicant to use the depreciation accrual rates recommended by the staff until further order of the Commission.

SUMMARY

In summary the following table reflects the adjustments discussed above:

REVENUE	
Electric	$268,930,886
EXPENSES	
Operation and Maintenance	
Labor	39,331,248
Other than Labor	25,705,740
Fuel	65,932,686
Purchased Power	5,008,882
Donations	300,000
TOTAL OPERATION AND MAINTENANCE	$136,278,556

Provision for Depreciation	$ 25,127,015
Gain from Sale of Utility Property	(59,656)
Taxes	
Taxes Other Than Income	34,658,749
Federal Income Tax	13,120,510
Future Federal Income Tax	27,981
TOTAL TAXES	47,807,240
TOTAL EXPENSES	209,153,155
RETURN	$ 59,777,731

III. RATE OF RETURN

CEI has sought to increase its rate of return in order to meet an increasing need to expand the facilities devoted to public service (CEI estimates construction expenditures of $129,000,000 during 1971 and expects to invest approximately $697,000,000 during the next 5 years. The applicant argued that such an increase is needed to attract sufficient capital to provide adequate service, in the light of rising corporate expenses and a diminishing rate of return on investments.

The income available for fixed charges now being realized from the existing rates and charges in the amount of $59,777,731 when applied to the rate base of $1,175,870,000 approved by Commission, resulting in a rate of return of 5.08%.

The two witnesses testifying as to a proper rate of return, in recommending rates of return higher than 5.08% implied that said rate was insufficient to provide CEI with reasonable compensation for the electric service rendered and this Commission so finds.

The applicant's witness, Mr. Brooks, recommended allowance of a current cost of debt, as of the date certain, of 7.35%, a current cost of preferred equity, at the same date, of 7.90%, and an allowance of 11.75% as return on common equity. Applying these allowances to CEI's capital structure results in a recommended rate of return of 9.05%.

Mr. Brooks arrived at substantially the same conclusion by employing three separate approaches, all of which involved an "estimate" of the cost of common capital which in turn included a factor for "investor expectation of growth in earnings" (App. Ex. 31, p. 20).

In utilizing a rather complex formula, Mr. Brooks made a basic "judgment" of percentage of earnings growth rate arrived at by an "evaluation" of the historic electric earnings growth rate and an "evaluation" of earnings growth rates to produce bond coverage ratios "barely sufficient to preclude deterioration in band ratings . . ." (App. Ex. 31, p. 31). Mr. Brooks recommended that a factor of 320 (reflecting investor expectation for growth in earnings) be added to the earnings price ratio adjusted for underpricing and commission cost, 8.55 to arrive at a current cost of capital of 11.75% (App. Ex. 31, p. 23, Ex. 32, p. 7).

Mr. Rothey, on the other hand, combined the average rate of growth in earnings of comparable electric utilities with the dividend yield to obtain an estimate of 11% as a proper investor discount rate for common stock. However, Mr. Rothey adjusted the 11% to eliminate the inflation factor, a calculation which he believed necessary in Ohio because the RCNLD rate base eliminates "the eroding effect of inflation upon the value of an investment" (Staff Ex. B, pp. 11, 12). The net result was an estimated cost of common capital of 8.5. Mr. Rothey used the em-

bedded cost of debt as of the end of the test year which was 6.5% (Staff Ex. Sched. I). The cost for the preferred stock of 7.4% represents the actual amount on the $50,000,000 issue which occurred within the test year (Staff Ex. B, p. 10).

In addition, Mr. Rothey computed as a part of capital structure those amounts of funds representing the contributions in aid of construction account and the deferred credits account comprised of deferred investment credit and accumulated deferred income taxes. He predicated his theory upon the facts that 1) such funds are truly as much a part of a company's financing as funds generated from sale of stocks and bonds and 2) these funds are used to make permanent additions to the fixed plant and 3) these funds represent in effect interest free loans, which to be fair to the suppliers of the capital (the federal government and in reality tax paying consumers) should be included in the capital structure to prevent a positive return from being earned on assets which the funds represent (Staff Ex. B, pp. 13-14).

The approaches of both witnesses are defensible; the cost of common capital can only be estimated; that estimation is supported only by "evaluations" and "judgments." The results can never be tested scientifically. The selection of our expert's estimate does not imply that the other is "wrong." In the instant case, therefore, we find that the staff approach appropriate for the purposes of this proceeding. Using Mr. Rothey's computation, a rate of return of 7.05 results:

	Percent of Total	Cost	Weighted Cost
Common	38.7	8.5	.032895
Preferred	6.5	7.4	.004810
Debt	50.5	6.5	.032825
Deferred Credits	4.3	.0	.000000
	100.0		.070530

IV. TARIFFS

As a part of its application, CEI presented existing and proposed regulations governing electric service to its customers (App. Substitute Ex. A and B). The Commission's staff received the proposed schedules and regulations and made various comments and recommendations in the Secretary's Report (pp. 31-40). These recommendations generally refer to matters of a procedural nature dealing with areas such as the propriety of requiring written applications for service, discontinuance of service, reconnection charge, billing period, bill payment, access to premises, liability, distribution and service facilities and other additional recommendations.

The applicant has in its objections to the Secretary's Report asserted that the Commission lacks jurisdiction to consider tariff provisions not put in issue by the applicant. CEI contends that no change was proposed in many of its tariffs other than renumbering and reordering the provisions. Since these provisions do not affect the propriety of a rate increase directly, CEI reasons that the Commission lacks jurisdiction in this proceeding to adopt the staff's proposals. The position of the Commission's staff is that the applicant has not limited its application to in-

clude only changes in new regulations directly affecting rates. The Commission's staff views Exhibit B of the application as setting forth an entirely new tariff and looks to Section 4909.19 Revised Code to find a statutory obligation for the Commission to investigate and report all matters contained in the application and exhibits. The Commission's staff asserts that the general rules and regulations contained in the applicant's proposed tariff will have a direct effect on the applicant's service.

As was the case in *Ohio Power Company,* Case No. 71-283-Y, the contention of the applicant assumes that each tariff provision is independent from another and should be viewed by itself without consideration being given to its impact or consistency with the tariff provisions taken as a whole. The Commission cannot agree with such a proposition. As was also stated in *Ohio Power,* such an agreement by the applicant fails to acknowledge that the staff is mandated by Section 4909.19 Revised Code to conduct an investigation encompassing not only the application and the exhibits attached thereto, but also, "of all matters connected therewith." Therefore, the Commission must conclude the scope of a general rate increase request certainly includes nearly all, if not all of the applicant's rules and regulations which in any manner could be applied in charging the new rates.

Initially, in dealing with the tariff issues the Commission must deal with placing the burden of proving in an application, pursuant to Section 4909.18 Revised Code, that proposed rate schedules will not be "unjustly discriminating" under the terms of Section 4909.15 Revised Code. It is the position of the Commission's staff that while Section 4909.15 and Section 4909.18 are silent on the question of who has the burden of proof in establishing whether a specific rate proposal is reasonable or unreasonable, the rationale used in Commission motor carrier and railroad cases can be used to place the burden on the utility. In the interest of the public, the Commission's staff suggests the applicant should in an application to increase rates, be required to prove that its rate schedules are not in violation of the law. Such an approach, the Commission's staff argues, would place the burden of proof on the party who will most easily be able to provide the Commission with the data it will need to make a proper determination. We find this argument to be compelling. This is the policy that has been adopted by the Federal Power Commission and the Federal Communications Commission and by this Commission in Ohio Bell Telephone, Case No. 36,495 (December, 1972).

The applicant has taken issue, by way of its ninth objection, to a number of specific recommendations made by the staff (S.R. pp. 31-40). Following the initiation of this proceeding, the applicant and the Commission's staff joined together in reaching agreements relating to a number, but all of the specific areas of controversy. The agreements are expressed in Exhibit 53 as submitted by the applicant and are accepted by this Commission as a proper resolution of such controversies.

(a) *Construction of Underground Facilities*

Intervenor Rocky River limited its participation to the issue of the propriety of CEI's proposed regulation to assess consumers of a municipality the cost of special construction of lines where said construction is required by that municipality and not otherwise paid for. The staff opposes the regulation because it passes on the excess costs of underground construction to the consumers without regulatory review of a charge assessed by the utility. The staff also opposes these rules because it believes that, by

including the costs in the residents' electric bill, the municipality would be, in effect, taxing its citizens for the construction of the underground lines. The staff is not opposed to having the municipality bear the costs directly, but the staff does not approve of the proposed way that this theory is to be implemented by the applicant. The problems which the staff sees in the proposed implementation are more fully developed in the brief filed by intervenor, Rocky River.

The brief of intervenor, Rocky River, addresses to the generality and vagueness of the proposed rules. In addition intervenor believes that there are certain instances in which the applicant should have to absorb the excess costs of underground construction of lines. Specifically, the intervenor believes that when it has been judicially or administratively determined that overhead construction would have an adverse effect upon the public interest, the municipality and its citizens should not be required to bear these excess costs. The intervenor states that "the question to be resolved by this Commission is whether residents of a municipality or the municipal government itself should be required to bear the excess costs of underground construction of transmission or distribution lines made necessary because overhead construction would 'unreasonably' affect the public welfare. Equity requires that under such circumstances applicant absorb the excess costs involved (brief p. 12)." What the intervenor does not state is that if the applicant could not pass on the excess cost to the specific municipality, and citizens thereof involved in the construction of underground lines, the applicant would not absorb the excess cost but would instead pass them on across its entire service area.

The intervenor also objected to the proposed rules on the basis that the applicant's customers would be paying

twice for underground construction since the value of this underground construction would be included in the rate base of a later rate case.

In support of its contention that the proposed rules are "indefinite, uncertain and incomplete," Rocky River noted that Rule 9(a)(3) applies to "special construction" while Rule 9(a)(4) refers to "underground or other special construction," and that several of the terms used in these rules are not defined. The intervenor also argued that the rules offer no guidelines for deciding whether a flat charge, proportional charge or surcharge would be assessed on the electric service bills for the excess costs of this special construction. Also, the intervenor objected to the lack of a provision requiring applicant to obtain competitive bids for the construction. Finally, the intervenor stressed that if these rules are adopted they should only be enforced prospectively.

The intervenors' objections as to vagueness are well taken as are its objections to the absence of guidelines for assessing charges.

The basic issue to be decided is whether all of CEI's customers should bear the special construction costs or only those consumers of the benefitting municipality.

As matter of policy this Commission believes that where a judicial or quasi judicial determination has been made by the proper authority that overhead construction would have an adverse effect upon the public interest, CEI directly should bear the additional cost as an expense of doing business. Absent such determination, the consumers in the affected areas who benefit from the underground construction pay the additional costs. However when consumers are assessed the additional costs, the company's

books should not reflect the additional amount for rate case purposes since it was directly reimbursed.

Therefore the applicant should submit to the Commission for its approval an amended version of Rules 9 (a)(3) and 9(a)(4) which eliminate the vagueness, provide for a specific and verifiable manner of computing the additional construction costs and which reflect the policy enunciated above.

(b) *Miscellaneous Provisions*

Consideration of recommended tariffs has been narrowed further by the parties to this proceeding, in that the staff has chosen to withdraw Recommendation 15(B)(1) dealing with transfer of right-of-way (R. p. 2796). The applicant and staff have also agreed that Recommendation 11, relating to limitations on liability shall not be in issue (R. p. 3530). Therefore, only points relating the Recommendations 10(C), 14(C), and 15(B)(6) remain in issue as between the staff and the applicant.

The applicant submitted a tariff provision under which access to the customer's premises is required "at any reasonable time." The Commission's staff by way of Recommendation 10(C) suggests that the provision is vague and subject to misinterpretation or abuse, and therefore the applicant should further define the term "at any reasonable time" to be "during the company's normal working hours." Additionally, the applicant is requested to make provision in its tariff for identification of an applicant's agent. CEI contends that its tariff as submitted, is reasonable and any modification is impracticable. The Commission deems it essential that notice be provided the parties coming under this provision and at the same time, it is in the interest of the public to maintain a low level of expense for the applicant in carrying out activities within

this provision. The Commission is also aware of the fact that "reasonable time" provisions have been allowed a recommendation of the staff in recent applications of the applicant.

The Commission's staff recommendation 14(C) relating to itemization of billing is challenged by the applicant because such a recommendation, in the view of CEI, would be impractical. CEI provided testimony indicating that compliance with the Commission's staff request would increase overhead expense by 20% (T. p. 2829), however, no actual cost data was presented in support of that contention. Without such a provision requiring itemization, no notice is given to the customers and for this reason the Commission finds it is necessary to direct applicant to comply with the recommendation.

By way of recommendation 15(B)(C) the Commission's staff has requested service at normal voltages and called for voltage deliveries at the service entrance to be within the range of plus or minus 5% of the nominal voltage of service. The applicant objected to this recommendation but there is no testimony brought forth to support the position of the applicant that such provisions are impractical and unnecessary.

Such a standard of service as would be established by this recommendation has been accepted by the NARUC and by commissions in other jurisdictions. The same Commission staff's recommendation was found to be reasonable and proper in *Toledo Edison Company,* Case No. 71-148-Y and has been ordered in other recent applications coming before this Commission. As a matter of sound public policy, it is felt that applicant should be ordered to make such a regulation as a part of its tariffs to be filed with this Commission.

V. RATE STRUCTURE ANALYSIS

(a) *Fuel Adjustment Clause*

In pertinent part the fuel adjustment clause proposed by applicant states:

> "The cost of fuel used in ascertaining such weight average cost of fuel for electric generation shall include the invoice cost; all taxes, assessments, or other costs imposed in the purchase, consumption or the content of emissions, from any fuel burned; all transportation, switching or demurrage trains; costs incurred in owning or operating coal mines; drying or other costs incident to coal pipelines; and all costs of owning, leasing and operating oil or gas pipelines."

The staff suggested the cost of the fuel shall include only the cost of the fuel from those sources normally supplying fuel at the date of issuance of this order plus the cost of transporting such fuel from its source to the site and grounds of the generating plant at which it is intended that the fuel shall be used (S.R. p. 42). In addition to limiting the items taken into account in determining the cost of fuel the staff also recommends adoption of a provision which would impose upon the applicant the duty of submitting changes in the source of supply of fuel to the Commission for approval. CEI initially objected to both provisions, however, the Commission's staff and the applicant have arrived at an agreement expressed in Applicant's Exhibit No. 50, relating to the latter recommendation. Consequently, the disagreement between the staff and the applicant now centers around the measurement of the cost of fuel. The applicant contends that a recovery should be allowed for such a difference between the quantum of energy brought into the applicant's system for use in generation and the quantum of energy produced. The applicant bases its claim on the belief that it is beyond the power of the applicant to prevent such losses; such losses being a natural result of the mechanics of the central station electric service. It is the applicant's contention that such a recovery by the utility has been allowed for a number of years (T. p. 2451).

Further, the applicant contends that weighted average cost of fuel should include taxes, assessments or other costs imposed on the emissions from the fuel and that the fuel clause should include the Ohio excise taxes which are incurred by the company as a result of the revenues derived from the use of the clause. Alternatively, the Commission's staff has asserted that the fuel cost adjustment clause is intended to recover the cost of generating the energy and nothing more (T. p. 2701). Mr. Bingham testified that he did not know of any taxes, assessments imposed upon the purchase, consumption, or content of emissions (T. p. 2452) and that the normal procedure of rate cases would make adjustment for increases in the amounts of Ohio excise taxes periodically (T. p. 2460).

The Commission finds these issues to be clearly within its scope of discretion and accepts the position of the Commission's staff relating to this matter. The Commission recognizes that fuel adjustment clauses approved by the Commission and the utility industry have varied considerably until recently. Beginning with *Toledo Edison Company,* Case No. 71-148-Y, issued January 31, 1973, however, and all electric cases following it, the Commission has consistently held that the conversion factor which translates cost of fuel to rates (in cents) per kilowatt-hour be based completely on the average *net* heat rate of applicant's generating facilities and *not* include adjustments for transmission or distribution losses, company use (outside the plants), excise tax provisions, or "unaccounted for" items.

See, for example, *Ohio Edison Company,* Case No. 71-233-Y issued April 19, 1973, *Dayton Power & Light,* Case No. 71-740-Y issued September 14, 1973, and Case No. 71-730-Y issued October 11, 1973, and *Ohio Power Company,* Case No. 71-287-Y, issued October 26, 1973. Rather than set forth a specific clause which the applicant must use, we find it appropriate to require the applicant to formulate a fuel adjustment clause that can be recommended by the staff as well, in order that it may receive Commission approval.

(b) *Water heater and space heating discount rates*

The applicant presented testimony and an exhibit (23 B) to support its contention that water heating and space heating discounts were appropriate in its rate design. Applicant Exhibit 23 B demonstrates that the average residential space heating and water heating discounts per kwh of annual use amounts to 66¢ per kwh (p. 4) and 37¢ per kwh (p. 2) respectively, relatively insubstantial amounts. However, applicant's proposal to retain water and space heating discounts ignores the overwhelming necessity to promote conservation of energy. As we stated in *Dayton Power & Light,* Case No. 71-730-Y issued October 11, 1973, these discounts may well have been justified by, among other things, a consideration of gas company competition. However, this rationale is no longer applicable and the considerations of energy conservation outweigh by far the historical promotional goals. Therefore, the Commission directs the applicant to limit applicability of the proposed discounts to present customers as of the date of this order and to those commercial customers or potential commercial customers who can show, to the satisfaction of applicant, that they had entered into contracts for, had issued purchase or orders for or had otherwise committed themselves for, the purchase of space heating or water

heating equipment and/or its installation prior to the date upon which this order is issued although such equipment may not be placed in service until later.

(c) *All electric apartment suite schedule*

For the same reasons indicated for the determination of electric and space heating discounts, the Commission directs applicant to limit the applicability of the proposed schedule to present customers.

(d) *Rate structure*

For many years this Commission has considered it proper and desirable that electric rates be so structured as to provide declining unit prices as the customers' usage increased.

The principle may have been justifiable in periods where promotion of electric energy usage reduced the excess capacity of the electric industry which might otherwise have remained idle. Such is not the situation today where all forms of energy are in short supply and conservation of resources has become a national policy.

The Sierra Club presented testimony of Dr. Tybout (Sierra Club Ex. 3) which explored various types of price structuring and which concluded that a more or less flat rate structure was the most desirable. While this Commission cannot base its determination of proper rate structure upon his testimony entirely as several of his assumptions were disproven by applicant's testimony the record does support a conclusion that some modification of applicant's proposed schedule is in order.

Applicant is therefore directed to reduce its proposals for minimum bills and initial energy blocks in the order of 20 percent and to make compensating increases in the higher usage energy blocks.

(e) *Contracts filed pursuant to Section 4905.30 Revised Code*

The Commission in its review of the within application has looked into the "special agreement" contracts of applicant that are on file with the Commission. It finds that in all cases such contracts deal with the purchase and sale of interruptible power and in some cases the purchase and sale of firm power. The rates, charges, terms and conditions of the sections of these contracts dealing with interruptible power appear to vary quite widely. The Commission believes that these contracts should be compatible with the standard industrial rates as they shall be proposed pursuant to this opinion and order. Applicant is therefore directed to prepare and submit to the Commission not later than ninety (90) days from the date of this order, a report showing in detail the conditions, considerations, and cost justifications leading to determination of the rates, charges, terms and conditions contained in each contract heretofore entered into by applicant and any proposed changes it would recommend pursuant to such review.

VI. DISPOSITION OF MISCELLANEOUS MOTIONS

The Sierra Club has made a motion requesting the Commission to order the staff and/or the applicant to tender to the intervenor funds commensurate with its expenses relating to this proceeding. The basis for this request is Sierra Club's belief that the staff has failed to represent the full interests of the public and its assumption of those responsibilities as a "private attorney general." Relief is claimed pursuant to Section 4903.24 Revised Code. The Commission cannot agree that the staff has failed to assume its responsibilities in this proceeding. Further, we can find no basis in the indicated

provision for affording the relief requested. The clear intention of this provision is to provide the Commission with a method of compensating itself for its costs when a utility is found to be directly responsible for causing needless expenses to be accrued by the Commission. Therefore, Sierra Club's motion is denied.

Local 38 of the International Brotherhood of Electric Workers has sought to intervene in this proceeding. The petition to intervene was signed on September 26, 1973, approximately three months after the hearing began and one month after the end of the hearing. Due to the vague nature of the Local 38 request and in light of compliance of these proceedings with notice requirements and other statutory provisions, the motions granted to the limited extent that a copy of this opinion and order shall be served upon counsel for Local 38.

FINDINGS OF FACT:

From evidence of record in this proceeding, the Commission finds that:

1. The value of all of applicant's electric property used and useful for the service and convenience of the public within the service area encompassed by this application, as of the date certain of June 30, 1971, is not less than $1,155,299,000, that the proper allowance for working capital is $20,571,000, thus applicant's rate base for this proceeding is $1,175,870,000.

2. For the twelve month period ending December 31, 1971, the test period in this proceeding, the revenues, expenses and income available for fixed charges from the rates for electric service now being charged and collected in the area involved

in this proceeding, are $268,930,886, $209,153,155 and $59,777,731 respectively.

3. This net annual compensation of $59,777,731 represents a 5.08 percent rate of return on a rate base of $1,175,870,000.

4. A 5.08 percent rate of return is insufficient to provide applicant with a reasonable compensation for the electric service rendered to customers served in the application area.

5. A rate of return of 7.05 percent is fair and reasonable and is sufficient to provide applicant a just compensation and return on the value of the property used and useful in furnishing the service described in the application.

6. A rate of return of 7.05 percent applied to a rate base of $1,175,870,000 will result in allowable dollar return in the amount of $82,898,836

7. The allowable annual expenses of applicant for the purposes of this proceeding is $232,271,299.

8. The allowable gross annual revenue to which applicant is entitled for the purpose of this proceeding is the sum of the amounts found in findings (6) and (7) or $315,170,134.

9. Applicant's present tariff provisions as may affect this application should be withdrawn and cancelled.

10. All objections to the Secretary's Report filed by the applicant have been ruled upon in the discussion portion of this opinion and order.

11. All objections to the Secretary's Report or motions not specifically considered in the discussion

portion of this opinion and order should be overruled.

12. The applicant should submit tariff schedules consistent with this opinion and order.

CONCLUSIONS OF LAW:

1. The application herein is filed pursuant to, and this Commission jurisdiction thereof, under the provisions of Section 4909.17, 4909.18 and 4909.19 Revised Code; further the applicant has complied with the requirements of the aforesaid sections.

2. The staff investigation has been conducted and a report duly filed and served and public hearing held herein and the written notice thereof have complied with the requirements of Section 4909.19 Revised Code.

3. The existing rates and charges now being charged and collected by the applicant for electric service in the territory affected by this application are insufficient to provide it with adequate net annual compensation and return on its property actually used and useful for the electric service furnished its subscribers.

4. A rate of return of 7.05 percent is fair and reasonable and is sufficient to provide applicant just compensation and return on its property actually used and useful for the electric service furnished its subscribers.

5. The applicant should be authorized to cancel and withdraw its presently effective tariff provisions on file with this Commission and to file tariff provisions consistent with the Commission's discussions and findings set forth above.

6. The effective date of the new tariffs shall be the second billing period after Commission approval of tariffs pursuant to this order. The applicant shall notify each of its customers by an insert in the first billing following said approval of the new tariffs. The applicant shall submit the proposed notice to the Commission when it files its tariff for approval.

ORDER:

It is, therefore,

ORDERED, That the applicant be, and hereby is, authorized to file tariffs consistent with the findings and discussion set forth above and to cancel and withdraw its present tariffs. It is, further,

ORDERED, That the tariff sheets authorized herein and the proposed billing notice shall be submitted for approval by this Commission. Upon receipt of two complete copies of said tariff conforming to this opinion and order, the Commission will review and approve same by entry. Thereafter, customers shall be noticed one billing period in advance of the effective date. It is, further,

ORDERED, That applicant file semi-annually commencing with June 30, 1974 a balance sheet, income statement and a cash flow statement in sufficient detail to permit analysis contained therein and a separate computation showing the rate of return earned on an updated RCNLD valuation as found in this proceeding. Such updating may be accomplished by adding the plant additions during the period between the date certain, June 30, 1971 and June 30, 1974. It is, further,

ORDERED, That all objections to the Secretary's Report or motions not specifically discussed within this opinion and order be overruled. It is, further,

ORDERED, That applicant submit a report described in the Rate Structure Analysis portion, relative to its contracts filed pursuant to Section 4905.30 Revised Code within ninety (90) days of the issuance of this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

The Public Utilities Commission of Ohio

EDMUND J. TURK
Chairman

SALLY W. BLOOMFIELD
Commissioners

APPENDIX B

Entry of the Public Utilities Commission of Ohio

(Dated January 18, 1974)

Case No. 71-634-Y

Before
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY FOR AUTHORITY TO AMEND AND TO INCREASE ITS FILED SCHEDULES FIXING RATES AND CHARGES FOR ELECTRIC SERVICE.

ENTRY

The Commission, coming now to consider the above-entitled matter and being fully advised in the premises, finds:

1. The applicant in this proceeding, The Cleveland Electric Illuminating Company, has proffered to the Commission for filing certain tariff documents and this Commission is satisfied that they meet all requirements of the Commission's order of November 28, 1973.

2. Such tariff documents having been reviewed by the Commission and its staff, it is found that certain elements of the order with regard to modifications of the company's rules and regulations have not in fact been met by the proffered tariff documents, although all requirements of the order with regard to rate schdules are found to be in compliance therewith.

3. The Commission finds that to comply with the above-described order the following shall be substituted for Sections 9.a.(5), (6) and (7), and 9.b. (2)(a) and (b):

9.a. General Distribution Facilities

(5) "Cost of special construction" and "cost of any change" as used in Rules 9.a.(3) and (4), respectively, shall be the actual cost to the company of such special construction or change and the excess thereof over the cost of standard construction. When a charge is to be based on the excess cost, the company and local jurisdiction shall negotiate the amount thereof.

(6) For the purposes of Section 9.a.(3) and (4), respectively, the municipality or other public authority involved may elect whether it will pay the cost of special construction or of any change, as hereinbefore defined, or whether such costs shall be paid for by the consumers served within its jurisdiction and, in the event of the latter, whether the same shall be paid by flat charge, proportional charge or surcharge. In the event that any such municipality or other public authority fails to make such election and to notify the company thereof prior to completion of construction of such facility, the same shall be paid for by the said consumers by surcharge on electric service bills.

(7) In the event that it shall be finally determined by a court of competent jurisdiction or by the Ohio Power Siting Commission or by the Public Utilities Commission of Ohio, that construc-

tion of the company's standard facilities would have an unreasonably adverse effect upon the interest of the general public in the municipality or municipalities traversed by the proposed line, Rule 9.a.(3) and 9.a.(4) shall be inapplicable to such construction.

9.b. Service Facilities

(2) Furnished at Consumer Cost

(a) When construction, reconstruction or relocation work is to be performed by the company for a customer at the request of the customer and it is expected that the customer shall bear the cost of the work, the company will furnish to the customer before work is commenced an estimate of the cost of performing the requested work. The customer may be required to deposit with the company in advance a sum equal to such estimate as a guarantee of payment for the work. Such estimate may be made in terms of the unit costs used by the company in estimating construction costs for its other purposes. When the work has been completed actual cost will be determined and an itemized bill rendered to the customer. This bill will show separately the cost of each major item of material, as a lump sum the cost of all minor material items, including number of man hours worked and average pay rate for those men and as a percentage of the above the company's standard charge for truck and equipment use and for general overhead.

The company may bill the customer for any excess of actual cost over the estimate originally furnished to him or shall refund to him any underrun. A reasonable explanation of overruns shall be supplied if such shall occur.

It is, therefore,

ORDERED, That the proffered tariff documents except for those sections of the rules and regulations ennumerated in Finding No. 3 shall be and the same hereby are approved. It is, further

ORDERED, That revised copies of the appropriate sheets of the rules and regulations sections of the tariff documents be revised in accordance with Finding No. 3 and the same hereby are approved. It is, further

ORDERED, That all tariff documents approved as above shall be made effective by the company on a date subsequent to the date upon which two (2) complete printed copies of all such tariff documents are tendered to the Commission's Tariff Department for filing. The documents so tendered are to be printed and to have the effective date thereof in an appropriate place thereon. It is, further

ORDERED, That the company shall file quarterly reports, commencing no later than April 30, 1974, containing the following information:

(1) Total revenue from sale of electric power.

(2) Revenue generated by each rate schedule approved by this entry.

(3) Average number of customers served under each rate schedule.

(4) Total number of kilowatt hours sold under each approved rate schedule.

The amounts reported shall separately indicate any revenue generated by action of the fuel adjustment rider. These reports shall include the comparable numbers and/or amounts experienced during the test period of Case No. 71-634-Y. It is, further

ORDERED, That nothing herein contained shall be deemed to be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule or regulation.

The Public Utilities Commission of Ohio
CARL R. JOHNSON
SALLY W. BLOOMFIELD
Commissioners

While I am not in agreement with the Opinion and Order in this case dated November 28, 1973, that Opinion and Order is the official disposition of the case by a majority of this Commission and the company is entitled to the implementation of that decision without undue delay. I have signed the Tariff Order to accomplish that result only.

CARL R. JOHNSON
Commissioner

APPENDIX C

Opinion of the Supreme Court of Ohio

(Decided June 11, 1975)

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE CLEVELAND ELECTRIC ILLUMINATING CO., *Appellant,* vs. PUBLIC UTILITIES COMMISSION OF OHIO, *Appellee.*	74-276
CITY OF CLEVELAND, *Appellant,* vs. PUBLIC UTILITIES COMMISSION OF OHIO ET AL., *Appellees.*	74-272
SIERRA CLUB, INC., *Appellant,* vs. PUBLIC UTILITIES COMMISSION OF OHIO ET AL., *Appellees.*	74-156

CORRIGAN, J. The appeal of The Cleveland Electric Illuminating Company will be considered first, followed by the appeals of the city of Cleveland and the Sierra Club. The Cleveland Electric Illuminating Company will be referred to as the Company, the city of Cleveland as the City, the Sierra Club, Inc., as Sierra, and the Public Utilities Commission as the Commission.

I A.

REQUIRED RETURN FOR EQUITY PORTION OF RATE BASE.

In its first argument, the Company contends that the Commission, in determining the rate of return, failed to follow the holding in *Ohio Edison Co. v. Pub. Util. Comm.* (1962), 173 Ohio St. 478, expressed in paragraph five of the syllabus therein, which reads:

"What will represent a reasonable annual compensation for the use of the property included in the rate base of a public utility will be the amount per year of income therefrom that would be required to induce investors to provide an amount equal to the rate base for the securities (such as bonds and shares of stock) of a corporation owning the property included in the rate base and engaged in the business of providing the public utility services being rendered by that property."

The Company asserts that the "* * * Commission did not state or even suggest in its Opinion and Order herein that the 7.05% return allowed * * * is the amount required to induce investors to provide an amount equal to the rate base for the securities (such as bonds and shares of stock) of a corporation owning the property included in the rate base of * * * [the Company]." Specifically, the Company contends that the Commission erred: (1) In its determination of the required return for the equity portion of the rate base; (2) in including in the rate of return calculation a "zero component" representing deferred credits; and (3) in finding that the cost of the bond portion of the rate of return should be 6.5 percent.

As pertinent to the foregoing issues, the Commission's opinion and order reads:

"The two witnesses testifying as to a proper rate of return, in recommending rates of return higher than 5.08%, implied that said rate was insufficient to provide CEI with reasonable compensation for the electric service rendered and this Commission so finds.

"The applicant's witness, Mr. Brooks, recommended allowance of a current cost of debt, as of the date certain, of 7.35%, a current cost of preferred equity, at the same date, of 7.90%, and an allowance of 11.75% as return on common equity. Applying these allowances to CEI's capital structure results in a recommended rate of return of 9.05%.

"Mr. Brooks arrived at substantially the same conclusion by employing three separate approaches, all of which involved an 'estimate' of the cost of common capital which in turn included a factor for 'investor expectation of growth in earnings' * * *.

"In utilizing a rather complex formula, Mr. Brooks made a basic 'judgment' of percentage of earnings growth rate arrived at by an 'evaluation' of the historic electric earnings growth rate and an 'evaluation' of earnings growth rates to produce bond coverage ratios 'barely sufficient to preclude deterioration in bond ratings . . .' * * * Mr. Brooks recommended that a factor of 320 (reflecting investor expectation for growth in earnings) be added to the earnings price ratio adjusted for underpricing and commission cost, 8.55 to arrive at a current cost of capital of 11.75% * * *.

"Mr. Rothey, on the other hand, combined the average rate of growth in earnings of comparable electric utilities with the dividend yield to obtain an estimate of 11% as a proper investor discount rate for common stock. However, Mr. Rothey adjusted the 11% to eliminate the infla-

tion factor, a calculation which he believed necessary in Ohio because the RCNLD rate base eliminates 'the eroding effect of inflation upon the value of an investment' * * *. The net result was an estimated cost of common capital of 8.5[%]. Mr. Rothey used the embedded cost of debt as of the end of the test year which was 6.5% * * *. The cost for the preferred stock of 7.4% represents the actual amount on the $50,000,000 issue which occurred within the test year * * *.

"In addition, Mr. Rothey computed as a part of capital structure those amounts of funds representing the contributions in aid of construction account and the deferred credits account comprised of deferred investment credit and accumulated deferred income taxes. He predicated his theory upon the facts that 1) such funds are truly as much a part of a company's financing as funds generated from sale of stocks and bonds and 2) these funds are used to make permanent additions to the fixed plant and 3) these funds represent in effect interest free loans, which to be fair to the suppliers of the capital (the federal government and in reality tax paying consumers) should be included in the capital structure to prevent a positive return from being earned on assets which the funds represent * * *.

"The approaches of both witnesses are defensible; the cost of common capital can only be estimated; that estimation is supported only by 'evaluations' and 'judgments.' The results can never be tested scientifically. The selection of our expert's estimate does not imply that the other is 'wrong.' In the instant case, therefore, we find that the staff approach appropriate for the purposes of this proceeding. Using Mr. Rothey's computation, a rate of return of 7.05 results:

	"Percent of Total	Cost	Weighted Cost
"Common	38.7	8.5	.032895
"Preferred	6.5	7.4	.004810
"Debt	50.5	6.5	.032825
"Deferred Credits	4.3	.0	.000000
	100.0		.070530"

In respect to the rate of return on the equity portion of the rate base, the Commission adopted the recommendation of 8.5 percent made by its chief economist, Mr. Rothey, even though Rothey, himself, estimated 11 percent before making the adjustment he felt was required "because the RCNLD rate base eliminates 'the eroding effect of inflation upon the value of an investment.'" Relative to Rothey's testimony concerning the adjustment, the record contains the following:

"Q. Pardon me, Mr. Rothey, I thought having defined our terms I could ask the questions without repeating them in every question, but I will start again. The subject of this interrogation, Mr. Rothey, is the appropriate rate of return on the equity portion of the rate base of a public utility, and my understanding is your testimony is that from market evidences you reach the opinion a fair rate of return on the equity portion of the rate base of a public utility, electric utility, comparable to The Cleveland Electric Illuminating Company, except that they are in other states, is 11 percent, and that because of special considerations relating to the Ohio method of regulation you reached a conclusion that in Ohio and for the Illuminating Company this figure becomes more appropriately nine percent.

Have I correctly stated your opinions as expressed in your testimony?

"A. Yes, sir.

"Q. All right, now this 11 percent and this 9 percent corresponding figure relates as a basis for their determination by you to the market price of the shares of stock in the first instance, do they not?

"A. Yes.

"Q. Then you expressed the opinion that in order to determine what is a fair rate of return for the utility to earn upon its rate base that this is the fair rate of return which should be earned upon the rate base, do you not?

"A. 11 percent.

"Q. 11 percent in one case and then with respect to the Illuminating Company 9 percent, right?

"A. Correct.

"Q. Now, as I understand it the purpose of your Exhibit 14 is to support the opinion that so far as investors generally in the market are concerned their demand of 11 percent on a market value of their shares is in respect of utilities that are earning approximately 11 percent on the book value of the utility shares, do I correctly express the thrust of your Exhibit 14?

"A. I would like that question again."

(Previous question read.)

"A. I don't believe so. What I was attempting to do with this Exhibit 14, if I understood your question correctly, I would say no—what I was attempting to do with this Exhibit 14 was to observe what a rate of return on book value would do to the market to book ratio of the shares of the Company. I observed something around 11 percent rate of return on the book value would produce a market ratio sufficiently appropriate to allow the Company to issue new stock without diluting the ownership of the present owners.

"Q. And does that express your opinion as to the fair rate of return on the equity portion of the rate base?

"A. Yes, it does.

"Q. And you endeavored in this case to express an opinion as to a fair rate of return on the equity portion of the rate base which will produce such a market to book ratio?

"A. Yes sir.

"Q. All right, and it is your opinion then that the 9 percent return on rate base for The Cleveland Electric Illuminating Company will produce in the neighborhood of slightly above an 11 percent return on its book equity?

"A. Yes, sir."

The 8.5 percent rate of return for the equity portion of the rate base adopted by the Commission is thus based upon the opinion of its staff which, in turn, was based upon "* * * what a rate of return on book value would do to the market to book ratio of the shares of the Company."

In *Cleveland v. Pub. Util. Comm.* (1956), 164 Ohio St. 442, the court said, at page 444:

"Many of appellants' arguments represent attempts to circumvent the statutes of this state and the uniform decisions of this court with respect to the statutory rate base. For example, it is argued that the dollar amount of return should be based upon the public utility's actual 'earnings requirements'; and that, after this is done, the rate of return should be found by determining the percentage of the statutory rate base which such dollar amount of return represents. Further, it is argued that the 5.94 per cent return on the statutory rate base approved by the commission would, if 45 per cent of its capital were replaced by debt, represent 9.26 per cent earnings on 'total

capitalization' and a 9 per cent return on the 'net investment' in this public utility. However, under the Ohio statutes and the decisions of this court, the percentage return is to be related not to the 'total capitalization' or to the 'net investment' but to the statutory rate base (reconstruction cost new less depreciation) so that *neither the actual capital or net investment in this public utility nor its actual earnings requirements are really material* in a proceeding of this kind. Any such method of determining or testing the dollar amount of return as that which is advanced by appellants would eliminate any need at all for determining the statutory rate base. The reasons advanced in support of such arguments have previously been considered and rejected as unsound by this court. See *East Ohio Gas Co. v. Public Utilities Commission, supra* (133 Ohio St., 212), 218, 219."

Basing the rate of return for equity upon "what a rate of return on book value would do to the market to book ratio of the shares of the Company" goes beyond the "* * * statutes and the decisions of this court" which require the rate of return to be related to the statutory rate base. Therefore, the Commission erred in finding "the staff approach appropriate" in determining the 8.5 percent rate of return for the equity portion of the rate base.

I B.

RATE OF RETURN CALCULATION WHICH INCLUDES "ZERO COMPONENT" REPRESENTING DEFERRED CREDITS.

The Company next claims that the Commission erred in including in the rate of return calculation a "zero component" representing deferred credits.

In its brief, the Company states that: "* * * As of the date certain, the Company had on its books approximately $32 million of deferred credits representing income taxes deferred under the Internal Revenue laws relating to investment credits and amortization of pollution abatement facilities."

As noted in the opinion and order of the Commission, "* * * Mr. Rothey computed as a part of capital structure those amounts of funds representing the contributions in aid of construction account and the deferred credits account comprised of deferred investment credit and accumulated deferred income taxes." The Commission adopted Rothey's recommendation by including as part of the capital structure 4.3 percent for deferred credits upon which no return was allowed. As the Company suggests in its reply brief, the inclusion of this "zero component" in the capital structure is similar to the "hypothetical company" concept which was rejected in *General Telephone Co. v. Pub. Util. Comm.* (1963), 174 Ohio St. 575.

As did the creation of the "hypothetical company," the "zero component" for deferred credits apparently "* * * has as its ultimate purpose the reduction of the statutory rate base, which is a circumvention of the law of Ohio." *Ib.*, 174 Ohio St., at 579. Therefore, the Commission erred in including in the rate of return calculation a "zero component" representing deferred credits.

Interestingly, the Commission, itself, since issuing its opinion and order in this case, has changed its position on this question. The Commission, in case No. 72-415-Y, in *In re Application of the Cincinnati Gas & Electric Co.* (September 16, 1974), stated in its opinion and order:

"Mr. Rothey's analysis of applicant's capital structure also differed from Mr. Melnyk's approach in that Mr.

Rothey included as a part of the capital structure the contributions in aid of construction account and the deferred credits account which is comprised of deferred investment tax credits and accumulated deferred income taxes. Mr. Rothey assigned these elements a zero cost of capital. Upon further consideration of the propriety of the inclusion of deferred credits in the capital structure, the Commission finds that this treatment is inconsistent with the legislative intent to extend the advantages of the deferred investment tax credits at [*sic*] accumulated deferred taxes to the industry."

I C.

COST OF BOND PORTION OF RATE OF RETURN.

The next contention of the Company to be considered is the claim that the Commission erred in finding the cost of the bond portion of the rate of return to be 6.5 percent. That finding resulted from the Commission's adoption of Mr. Rothey's 6.5 percent calculation. On cross-examination, Mr. Rothey admitted that long term capital could not have been raised at 6.5 percent during the test year. In response to a question whether "it would have cost the Illuminating Company substantially more than 6½ percent * * * to have raised a substantial amount of debt capital, at or about the date certain," Mr. Rothey replied, "It would have cost them somewhere around 8 percent."

In view of the facts that the Company's witness testified that 7.35 percent was the current cost for bond money and the Commission's expert indicated that it was more than 6.5 percent, the Commission's finding of 6.5 percent is "manifestly against the weight of the evidence" (*Akron v. Pub. Util. Comm.* [1966], 5 Ohio St. 2d 237, 242) and, therefore, is unreasonable and unlawful.

I D (1).

VALUE OF RIGHT-OF-WAY USED AND USEFUL.

The Company raises two issues concerning land rights: (1) "Right-of-way used and useful in the rendition of electric service must be included in the rate base of a utility at its value as of the date certain," and (2) "land rights owned beneficially are a lawful part of a utility's rate base in a rate proceeding."

Regarding the value of land rights, rights-of-way, including easements and licenses, the Commission's opinion and order reads, in part:

"In dealing with valuation of land rights, the Commission's staff simply evaluated the varying easements and licenses held by applicant at their original cost, claiming that no acceptable method is available to adjust the value of the land rights either up or down. * * *

"* * *

"Witness Chisling [for the Company] employed the * * * method of applying trend factors to original cost because 'a parcel by parcel appraisal would be extremely costly and time consuming.' "

Chisling described the "cost trend method" as a method of "appraising the value of property by application of trend factors to the original cost, thus restating that original cost in terms of values at the date certain."

The Commission, stating that "in the absence of a verifiable method of assuring that there is a market value for applicant's rights-of-way" and "that the trending method does not comply with Section 4909.05, Revised Code," found the original cost of land rights to be the proper method of valuation.

As to the foregoing finding, the Company argues:

"In addition to the rejection of trending as unlawful, an apparent ground for refusing to find value for appellant's right-of-way * * * was that there is no 'verifiable method of assuring that there is a market value' for right-of-way easements. Since the trending method was used for less than 5 percent in value of the right-of-way and the values for the balance of the right-of-way was found by a witness and by methods specifically approved by the Commission, we must conclude that the Commission held that absent a showing that right-of-way easements are the subject of an established market they have no value for rate case purposes. This is a very disturbing holding because the statute, and the cases, permit the Company to earn only on the 'value' of the property used and useful in the public service. Original cost is in many instances used as value either because it is the best evidence thereof or because it is plainly less and by common consent is used as establishing a figure not less than value where the parties for some reason do not desire to expend the time or money required for an appraisal. However, here we had an appraisal for 95 percent of the right-of-way by methods specifically approved by the Commission. We do not believe that the Commission was saying that there is no method by which to value an easement. As the evidence shows—and it is common knowledge—such valuations are daily made for a variety of reasons. If the Commission is right, that it cannot accept value in the absence of a showing that there is a market in easements, then this is a holding that in such case an easement has no value at all and there is no basis under the statute for including it in the rate base at all. We believe that we have reason to be fearful that unless this court reverses the Commission on this point, the complete elimination of right-of-way from the rate base will be the next step."

Contrary to the Company's argument that the Commission held that right-of-way easements "have no value for rate case purposes," the Commission *did* value such land rights. Thus, the only issue before this court on the question is the propriety of the Commission's refusal to accept the land right values recommended by the witness, Chisling. This is fundamentally a question of evidence. As to evidentiary matters, in appeals from the Commission, this court "* * * will not substitute its judgment for that of the commission as to conclusions drawn * * * unless the findings and order of the commission are manifestly against the weight of the evidence or there is no evidence." *Akron v. Pub. Util. Comm., supra* (5 Ohio St. 2d 237), at 242; *Kenton v. Pub. Util. Comm.* (1965), 3 Ohio St. 2d 71, 73. Further a "* * * finding and order by the commission will not be disturbed unless it appears from the record that such finding and order are manifestly against the weight of the evidence and are so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty." *Cleveland v. Pub. Util. Comm.* (1965), 3 Ohio St. 2d 82, 84. In our opinion, the record supports the conclusions of the Commission regarding valuation of the Company's rights-of-way.

I D(2).

"LAND RIGHTS OWNED BENEFICIALLY" AS PART OF RATE BASE

The "land rights owned beneficially" which the Company claims should be included in its rate base is filled land upon which a part of the Company's Lakeshore Power Plant is situated. Title to that land is in the state of

Ohio but the Company has used the property since 1911. The Commission, in its opinion and order, concluded that this land, not being *owned* by the Company, could not be included as part of Company property for rate base purposes.

The Company points out that this identical question was at issue in proceedings before the Commission in 1918 and in 1947. In both instances the Commission included the value of the filled land in the Company's rate base. The Commission's order of 1918 was appealed to this court, and the issue, as the Company observes, was "fully briefed and argued before this court." In that appeal, this court modified the order of the Commission but did not disturb the Commission's conclusion to include the filled land in the Company's rate base. *Cleveland v. Pub. Util. Comm.* (1918), 98 Ohio St. 462.

We are not inclined to now reexamine or overrule the foregoing holding. The Commission's conclusion not to include the filled land in the Company's rate base is not in conformity with that decision and therefore is unreasonable and unlawful.

I E.

EXCLUSION FROM RATE BASE OF CERTAIN MATERIALS AND SUPPLIES.

The next proposition advanced by the Company reads:

"Materials and supplies kept on hand and reasonably necessary for the operation of the Company's business should be included in the rate base whether or not, when used, they are expensed or capitalized."

In respect to this contention, the opinion and order of the Commission reads:

"* * * The staff opined that materials and supplies held for capital accounts are not an appropriate part of the rate base and therefore should be excluded and therefore reduced the applicant's $8,846,000 figure for materials and supplies to $1,858,000 * * *.

"* * *

"Therefore the Commission's staff * * * excluded approximately $7,000,000 from the working capital accounts in materials held for capital accounts. The staff found that 79% of applicant's materials and supplies were properly classified as being within capital accounts. * * * The applicant contends that an exclusion of capital accounts is improper. The Commission does not agree. Exclusion of materials and supplies to be capitalized is not only relevant and proper but necessary in any computation of working capital."

As to materials and supplies, the staff report states:

"The engineers have reviewed the applicant's proposal for inclusion of $8,845,651 in the total company rate base as a working capital allowance for a material and supplies inventory. The engineers are of the opinion that materials and supplies inventory held for capital accounts are not an appropriate part of the rate base and have therefore excluded that portion of those inventories. This amount was determined by the company, by analyzing issues, to be 79% of the total.

"Average Material & Supplies Inventory	$8,846,000
"Less Amount to Capital Construction (79%)	$6,988,000
"Materials & Supplies	$1,858,000"

In *Cincinnati v. Pub. Util. Comm.* (1954), 161 Ohio St. 395, 406, 407, the following discussion is found concerning materials and supplies:

"It is proper to include in the rate-base structure a reasonable sum to cover the company's investment in materials and supplies for the normal operations of the company and for maintenance and repair purposes. But we know of no valid reason why an allowance should be made in the rate-base structure for investments in materials and supplies for new construction, extensions and additions, as distinguished from normal operations and plant maintenance and repair. The cost of materials and supplies held for new construction, extensions and additions may be capitalized in the rate-base structure, when such materials and supplies are in actual use. Prior to such actual use such property can not be considered as being 'used and useful for the service and convenience of the public,' as required by Section 499-9, General Code."

A Company witness, Mr. Loshing, was asked: "To what extent * * * does the material for this construction program come from materials and supplies account which you have assigned for working capital?"

The witness replied: "Very little goes through this materials and supplies account. * * * A good portion of the materials that are needed for what are prosaic construction, power plants, transmission subs, and high lines, is purchased directly on job orders for specific projects and delivered directly to the site."

Since the evidence indicated that "very little" of the construction funds of the Company passed through the "materials and supplies account," it was error for the Commission to reduce the amount allowed for materials and supplies by 79 percent for the reason that "79% of applicant's materials and supplies were * * * classified as being within capital accounts" under the Company's accounting system.

The Company includes in its brief an excerpt from the opinion and order of the Commission in subsequent proceedings before the Commission, *In re Application of East Ohio Gas Co.*, No. 72-378-Y, wherein the Commission retreated from the position taken on the allowance for materials and supplies herein and rejected "* * * staff's proposition that accounting treatment should be controlling * * *."

I F.

MATTERS NOT IN ISSUE UNDER APPLICATION.

The final issue presented by the Company is stated by it as follows:

"In a proceeding upon an application for an increase in rates filed by a public utility under Revised Code Section 4909.18, the Public Utilities Commission may not require the utility to assume the burden of supporting tariffs and regulations not placed in issue by the application before the commission."

To support this issue, that the Commission erroneously considered "changes in tariffs not put in issue by the application," the Company argues:

"* * * Over objection, the Commission required changes in regulations respecting time of access to customer premises, and itemization of charges for special construction and the establishment of a new regulation respecting voltage variations. * * *

"Of more consequence are the changes required * * * to eliminate from the fuel adjustment clause the

reflection of fuel costs respecting the generation of the 6 percent of the energy which is lost in the process of distribution and the elimination of existing tariff discounts reflecting lower costs for certain heating usages. We are not here attempting to argue the intrinsic merit of any of these matters. We contend that the Commission may not require changes in these matters without affirmative proof, and a finding on the basis thereof that they are required."

The Company contends further that "* * * under the statutes, the Commission is empowered to require changes in existing rates and practices only after a complaint in writing about them (Section 4905.26), and an affirmative finding upon proof after hearing that existing practices are unreasonable (Section 4905.37)."

In its opinion and order, the Commission stated that its "* * * staff is mandated by Section 4909.19, Revised Code, to conduct an investigation encompassing not only the application and the exhibits attached thereto, but also, 'of all matters connected therewith.' Therefore, the Commission must conclude the scope of a general rate increase certainly includes nearly all, if not all of the applicant's rules and regulations which in any manner could be applied in charging the new rates."

It is elemental that the "* * * commission is a creature of statute and has only those powers given to it by statute." *Ohio Bell Telephone Co. v. Pub. Util. Comm.* (1969), 17 Ohio St. 2d 45, 47. R. C. 4909.19 provides, in part:

"Upon the filing of any application for increase provided for by Section 4909.18 of the Revised Code * * * the commission shall at once cause an investigation to be made

of the facts set forth in the application and the exhibits attached thereto, and of the matters connected therewith."

We agree with the Commission's conclusion that R. C. 4909.19 permits it to review any of an applicant's "rules and regulations which in any manner could be applied in charging the new rates," but the Commission's authority ends there. The scope of the Commission's inquiry does not extend to matters not put in issue by the applicant and not related to the rates which are the subject of the application.

Therefore, the Commission erred in extending its order to those matters not put in issue by the application for rate increase or not related to the rates.

Inasmuch as the Company does not "argue the intrinsic merit of any of these matters" in this appeal, we will not attempt to delineate which of the issues fall within the realm of the Company's application or have an effect upon the rates.

II A.

PROPERTY USED AND USEFUL AS PART OF RATE BASE.

In case No. 74-272, in which the city of Cleveland is the appellant, the first proposition of law reads: "Plant located outside of Ohio is beyond the scope of the Commission's jurisdiction as defined by Section 4905.05 of the Ohio Revised Code and therefore cannot be included within the statutory rate base."

R. C. 4905.05 provides:

"The jurisdiction, supervision, powers, and duties of the Public Utilities Commission extend to every public utility and railroad, the plant or property of which lies

wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state, and to the persons or companies owning, leasing, or operating such public utilities and railroads, and to the records and accounts of the business thereof done within this state."

It is the City's position that R. C. 4905.05 limits the authority of the Commission to applicant's properly located "wholly within this state" and that the Commission "erred by including within the rate base the applicant's interest in the Seneca production plant which is situated in Pennsylvania."

The Commission, in its opinion and order, observed that "* * * Section 4909.18, Revised Code, permits applicant to submit a valuation 'of its property used and useful in rendering the service referred to in such application' " and found that "the Seneca Plant should be included because indisputably it is used and useful in rendering the service referred to in the application."

The City contends that R. C. 4909.18 is not concerned with the jurisdiction of the Commission but with "what should be contained in a rate application by a utility." Thus, the City would confine the jurisdiction of the Commission in determining a rate base to only the property of the utility within Ohio, even though the property located outside the state is used and useful in rendering the utility's service.

R. C. Chapter 4905 is concerned with the general powers of the commission, whereas R. C. Chapter 4909 regulates the fixation of rates. R. C. 4909.04, 4909.05 and 4909.18 all mention property "used and useful" by utilities in rendering service and do not limit such property to the

boundaries of the state. The test then under the statutes regulating fixation of rates is whether the property is "used and useful" in rendering the utility's service and not the location of the property.

Considering the foregoing statutes together, we perceive no intention on the part of the General Assembly to deprive a utility of the right of inclusion in its rate base of property used and useful in rendering service where such property is located outside the state.

To so hold would deprive the utility "* * * of the right to earn a reasonable return upon the * * * value of its property used and useful in the operation of its intrastate business in this state in violation of the fundamental legal principle that a utility is entitled to earn a reasonable return upon * * * its property devoted to public service." *United Fuel Gas Co. v. Public Service Comm.* (1957), 143 W. Va. 33, 51, 99 S. E. 2d 1. See, also, *Lone Star Gas Co. v. Texas* (1938), 304 U. S. 224; *Petition of Fryeburg Water Co.* (1955), 99 N. H. 487, 491, 115 A. 2d 420.

II B.

ALLOCATION FOR STREET LIGHTING.

The City's next contention is that the "plant, revenues, and costs related to * * * ordinance contract sales must be removed from the rate base, revenue, and cost totals utilized by the Commission to set new rates for other classes of customer."

In support of this contention, the City refers to the fact that the Company "during the test year had over $5,000,000 in revenues from street lighting and signal systems sales made pursuant to ordinance contracts entered into between the company and the affected municipalities."

Essentially, the City's position is that the Commission should have made an allocation of property, costs and revenues connected with street lighting services provided to municipalities under municipal contracts.

On this subject, the Commission stated, in its opinion and order: "* * * [B]oth staff and applicant have adjusted for the plant devoted to street lighting by including the revenues therefrom * * *. The staff found that a sample allocation indicated no measurable effect upon the rate of return and therefore an extended allocation was not justified for street lighting sales and sales to other public utilities * * *."

The record shows that, although the Commission made no allocation for street lighting and signal system sales, it included the revenues from those sources. The record contains the following discussion in the staff report concerning this allocation:

"This proceeding involves all types of sales except those for street lighting and to other utilities. An allocation, less detailed but with sufficient accuracy to form a judgment, indicated no measurable effect on the rate of return by going to an extended allocation. For this reason, and because street lighting is less than 1% of the total sales and because it is for the benefit of all customers, no formal allocation was made for this case."

Thus, it does not appear from the record that the finding of the Commission as to allocation for street lighting and signal system sales is "manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty." *Cleveland v. Pub. Util. Comm.*, *supra* (3 Ohio St. 2d 82), at 84, and *Delphos v. Pub. Util. Comm.* (1940), 137 Ohio St. 422, at 424.

II C.

ALLOCATION FOR INTERSTATE EXCHANGES.

The City's next contention is that the Commission should have separated "plant, revenues and costs" of the Company's "interstate sales and deliveries of electric energy from those allocable to its intrastate operations." This contention is directed to the Company's exchanges of electricity with utility companies in other states.

The Commission reached the same conclusion on this claimed need for allocation as it did on the asserted need for allocation of street lighting and signal system sales.

For the test year, 1971, the interchanges of electricity between the Company and others in interstate exchanges nearly balanced. The Commission's staff engineer testified as to the interstate exchanges:

"* * * As you know, I am concerned with the rate base and when I first got on the stand I explained our position as far as interchange of power and sales to other utilities was concerned. As long as these sales did not result in an amount of production facility or other facilities that were not required to service the utility's ultimate customer, then it was perfectly proper, and in our opinion—not only that, but somewhat profitable to the ultimate customers, in that if you could make sales with the somewhat underpowered production plant, and the facilities that you have that are needed for the ultimate customer, if you can make sales out of that equipment and the profits of such sales, whatever they are, or losses go to the ultimate customer, then the amount of production facilities is reasonable. But, if the amount of production facilities, for instance, is not reasonable, then you judge that sale to other utilities was a major business of the Company. But, in this case it seemed like it—while it hap-

pened that they were forced to rely on other means or other older equipment, they were still able to do it.

"So, as long as the production facilities are a reasonable amount for the ultimate customer, I don't see how we can make any correction in the rate base. And we didn't, for that reason."

As in the case of allocation of street lighting and signal system sales, the finding of The Commission is neither manifestly against the weight of the evidence nor unsupported by the record. Therefore, the City's claim that allocation was required for interstate exchanges is not persuasive.

II D.

FEDERAL INCOME TAX ACCRUALS.

The City's fourth proposition of law reads:

"All customer contributions in the form of accruals for the payment of federal, state, and local taxes to be paid by the applicant at future dates, which will be constant with reasonable certainty in the foreseeable future and which are available for working capital and for investment in materials and supplies, should be used to offset the allowances for working capital."

The foregoing proposition of law closely parallels paragraph five of the syllabus in *Cincinnati v. Pub. Util. Comm., supra* (161 Ohio St. 395). The City argues that the "* * * Commission has manifestly incorrectly applied the law to the facts of the instant case by failing to apply any of the federal income tax accruals as an offset to the Company's working capital allowances."

The record shows that in computing working capital the Commission's staff did not take into account the federal

income tax accruals of the Company. The Commission points out that "* * * staff of the Commission has developed a formula which attempts to arrive at a reasonable estimate of a company's working capital requirements" and that the "* * * formula does not attempt to take into account all tax accruals * * *." The Commission, in its brief, quotes from an opinion and order of the Commission in another rate case (*In re Application of East Ohio Gas Co., supra*) its rationale for the exclusion of federal income tax accruals:

"* * * The tax accrual offset recommended by the staff is the result of the staff's formula which has been refined over the years and which results in a reasonably accurate estimate of the benefit accruing to the appellant. The formula has the advantages of being relatively easy to understand and use, and its consistent application assures equal treatment among rate applicants. The staff's formula properly excludes federal income tax accruals because federal income taxes are now generally paid on a relatively current basis. The Commission has repeatedly and consistently accepted the staff formula as representing a reasonable estimate for the tax accrual offset."

Paragraph five of the syllabus in *Cincinnati v. Pub. Util. Comm., supra* (161 Ohio St. 395), *reads in part*: "* * * customers' contributions in the form of accruals for the payment of taxes * * * which will be constant with reasonable certainty * * * and which are available for investments in materials and supplies, or for use as working capital, should be used as an offset on the allowance for working capital * * *."

The record shows that there were some accruals for federal income tax payments and that the evidence as to the amount was conflicting. There is nothing in the

record to support a conclusion that these accruals were not available due to their payment "on a relatively current basis." Since there were some federal income tax accruals and the Commission made no allowance for them in the formula used for determining working capital requirements, it follows that the Commission failed to properly apply the holding in *Cincinnati v. Pub. Util. Comm., supra,* in computing the allowance for working capital.

II E.

ALLOCATIONS BETWEEN RATE CLASSES OF CUSTOMERS.

The final contention of the City is that the Commission "* * * has a duty to fix and determine just and reasonable rates which cannot be discharged in the total absence of cost of service evidence by major rate class" and that the Commission "cannot blindly set rates when the only cost of service evidence for any of the major rate classes discloses the existence of unreasonable discrimination." It is the City's position that the evidence "showed that both the large industrial rates that were then in effect and the proposed large industrial rates produced a much lower rate of return than the overall rate or return enjoyed by the applicant upon all of its electric operation" and that therefore "the large industrial customer has been and is now being subsidized by the other ratepayers."

As the Company observes in its brief, the City here "seeks to have an allocation made of all of the Company's property and income account between all of its various classes of customers."

We will address ourselves to this issue under Part *III B* below.

III A.

VALIDITY OF SIERRA APPEAL.

Similar issues are raised in case No. 74-156, wherein the appellant, Sierra Club, Inc., a California nonprofit corporation interested in conservation of natural resources with members in the service area of the Company, proffers two propositions of law, which read:

"1. Rate schedules that on their face discriminate between and among customer classes must be justified on the basis of cost of service. A failure by the utility applicant to justify such rates by reliable and probative evidence before the Public Utilities Commission requires that the proposed rates be held to be unjustly preferential and unjustly discriminatory and therefore in violation of Section 4909.15 of the Revised Code and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

"2. When the only expert testimony presented before the Public Utilities Commission supports the proposition that proposed utility rate structures are not cost of service related, but are in fact based upon a subsidization of one customer class by another and that subsidization is not based upon valid considerations of economic and public interest justification, the Public Utilities Commission is prohibited from approving the submitted rates."

The Commission argues that this court should refuse to consider Sierra's appeal, for the reasons that the notice of appeal "fails to specify the errors in the Commission's order" and that Sierra has no standing. The Company, as intervening appellee, advances the procedural argument that Sierra, in its notice of appeal, "designates the order appealed from as the Commission's entry of January 28, 1974" when, in fact, the appeal relates to the order of

the Commission made on November 28, 1973. The Company notes also that no application for rehearing was filed by Sierra to the order dated January 28, 1974.

Although the foregoing factors all present serious questions as to the validity of the Sierra appeal, the issues raised by Sierra are similar in character to those raised by the City in its final contention in case No. 74-272, and this court will, therefore, consider them.

III B.

RATE DIFFERENCES BETWEEN CUSTOMER CLASSES.

R. C. 4909.04 provides:

"The Public Utilities Commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads, or for any other purpose authorized by law, may investigate and ascertain the value of the property of any public utility or railroad in this state used or useful for the service and convenience of the public. At the request of the legislative authority of any municipal corporation, the commission after hearing and determining that such a valuation is necessary may also investigate and ascertain the value of the property of any public utility used and useful for the service and convenience of the public utility where the whole or major portion of such public utility is situated in such municipal corporation."

This section was interpreted in *Toledo Edison Co. v. Pub. Util. Comm.* (1954), 161 Ohio St. 221, wherein the court said, at page 229:

"This section [actually R. C. 4909.04 but incorrectly reported as R. C. 4904.04], as formerly enacted [General

Code 499-8], contained the word, 'shall,' where it now contains the word, 'may,' and it would seem that the valuation of the property of a public utility or railroad, in reference to rate fixing, is now, within proper bounds, discretionary with the Public Utilities Commission."

The court in that case, also stated, at page 234:

"* * * the Public Utilities Commission has discretion, in the fixing of a single freight rate, to base that rate upon matters other than the valuation of the property of the railroad and the actual cost of operation, although it has full authority to require such evidence of valuation if in its opinion such findings are necessary to a proper determination of rates. * * *"

Thus, the Commission was not required to make the cost of service allocation for classes of customers as contended by the City.

Rate differences for various classes of customers are permissible. As stated in *Buckeye Lake Chamber of Commerce v. Pub. Util. Comm.* (1954), 161 Ohio St. 306, 311, the "general rule is that * * * 'a utility may, without being guilty of unlawful discrimination, classify its customers on any reasonable basis and make separate rates for each class.' * * *"

R. C. 4905.31 authorizes utilities to make classifications of services with varied charges. It reads, in part:

"Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923, and 4925 of the Revised Code do not prohibit a public utility from filing a schedule or entering into any reasonable arrangement with another public utility or with its customers, consumers, or employees providing for:

"* * *

"(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;

"(E) Any other financial device that may be practicable or advantageous to the parties interested. No such arrangement, sliding scale, minimum charge, classification, variable rate, or device is lawful unless it is filed with and approved by the Public Utilities Commission.

"* * *

"Every such arrangement, sliding scale, minimum charge, classification, variable rate, or device shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission."

Applying G. C. 614-17, the predecessor to R. C. 4905.31, the court held, in paragraph two of the syllabus, in *Cleveland & Eastern Traction Co. v. Pub. Util. Comm.* (1922), 106 Ohio St. 210:

"The schedules of rates and charges required to be filed by a public utility company with the Public Utilities Commission may contain a classification of its service, which classification should be based upon the quantity used, the time when used, the purpose for which used, the duration of use, and other reasonable considerations which essentially distinguish the service required to meet the various demands."

The Commission, in its opinion and order, made the following finding as to rate structure:

"For many years this Commission has considered it proper and desirable that electric rates be so structured as to provide declining unit prices as the customers' usage increased.

"The principle may have been justifiable in periods where promotion of electric energy usage reduced the excess capacity of the electric industry which might otherwise have remained idle. Such is not the situation today where all forms of energy are in short supply and conservation of resources has become a national policy.

"The Sierra Club presented testimony of Dr. Tybout * * * which explored various types of price structuring and which concluded that a more or less flat rate structure was the most desirable. While this Commission cannot base its determination of proper rate structure upon his testimony entirely as several of his assumptions were disproved by applicant's testimony the record does support a conclusion that some modification of applicant's proposed schedule is in order.

"Applicant is therefore directed to reduce its proposals for minimum bills and initial energy blocks in the order of 20 percent and to make compensating increases in the higher usage energy blocks."

Thus, the Commission partially granted the relief sought by Sierra even though its staff made the following recommendation as to rate structure:

"1) Under 5a the petitioner urges the Commission to cause applicant to eliminate 'declining block rates'. The rate engineers recommend that the Commission reject this recommendation by petitioner on the grounds that rates of this type recognize the long established and acknowledged facts (i) that the cost of rendering service to the customer declines as the volume of such service increases; (ii) that this type of rate has been accepted as just and reasonable over many years and (iii) that rates of this type, having been tried and used over many years are

now offered by a vast majority of electric utilities operating in all parts of the United States.

"* * *

"In closing it may be said that while the rate engineers understand that it may be entirely legal and no doubt praise worthy for the Commission to attempt to alleviate the hardships of the low income segment of our population by manipulating utility service rates they nevertheless by their recommendation to the Commission that the traditional rate pattern of price[s] receding as usage increases be retained in this proceeding."

It appearing that the order of the Commission respecting rate structure is neither "manifestly against the weight of the evidence" nor "so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty," the contentions of the City and Sierra in regard thereto are rejected.

IV.

EFFECT OF ADMINISTRATIVE DETERMINATION.

In respect to two issues raised herein, the Commission, in its opinions and orders in subsequent proceedings, has reversed the position taken in these proceedings. In addition, the Commission has departed from its prior determinations in respect to the Lake Shore property used by the Company. Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.

Appropriate to the foregoing comments are the following statements found in *State, ex rel. Automobile Machine Co., v. Brown* (1929), 121 Ohio St. 73, 75:

"It has been held in this state that 'administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative to do so.' *Industrial Commission v. Brown*, 92 Ohio St. 309, 311, 110 N.E. 744, 745 (L.R.A., 1916B, 1277). See, also, 36 Cyc., 1140, and 25 Ruling Case Law, 1043, and cases cited.

"This is a well-recognized principle of statutory construction and we deem it applicable in the present instance. * * *"

V.

CONCLUSION.

In case No. 74-276 and in case No. 74-272, the order of the Commission, being unreasonable and unlawful, is reversed, in part, and the causes are remanded to the Commission for further proceedings in accordance with this opinion. In case No. 74-156, the order of the Commission is affirmed.

In case Nos. 74-276 and 74-272, *order affirmed in part and reversed in part.*

In case No. 74-156, *order affirmed.*

O'NEILL, C. J., STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

HERBERT, J., concurs except for the eighth paragraph of the syllabus.

APPENDIX D

Unrelated Decision of the Public Utilities Commission of Ohio

Case No. 71-634-Y

Before

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY FOR AUTHORITY TO AMEND AND TO INCREASE ITS FILED SCHEDULES FOR FIXING RATES AND CHARGES FOR ELECTRIC SERVICE.

OPINION AND ORDER

The Commission, coming now to consider the above-entitled matter, its Opinion and Order herein of November 28, 1973, the decision of the Supreme Court of Ohio in *Cleveland Electric Illuminating Company v. Public Utilities Commission,* 42 Ohio St. 2d 403 (1975) which affirmed in part and reversed in part that order, and being otherwise fully advised in the premises and in compliance with Section 4903.09 Revised Code, hereby renders its Opinion and Order on remand.

HISTORY OF THE PROCEEDINGS:

This case originally came before the Commission upon the application of The Cleveland Electric Illuminating Company for authority to increase its rates and charges for electric service. On November 28, 1973, this Commission issued its Opinion and Order granting, in part, the

prayer of the application and authorizing applicant to increase said rates and charges, but not to the full extent requested by applicant. By Order dated January 22, 1974, the Commission accepted the new rates for filing. Applicant and the City of Cleveland and the Sierra Club, both of which had duly intervened herein, appealed to the Supreme Court of Ohio from the Commission's Opinion and Order of November 28, 1973. On June 11, 1975 the Supreme Court issued its decision in *Cleveland Electric Illuminating Company v. Public Utilities Commission,* 42 Ohio St. 2d 403 (1975), affirming in part and reversing in part this Commission's Opinion and Order of November 28, 1973. This matter has now come on for consideration by the Commission pursuant to the mandate of the Supreme Court as set forth in that decision.

APPEARANCES:

Messrs. Alan D. Wright and Harry G. Fitzgerald, Jr., 1010 Euclid Avenue, Cleveland, Ohio, and Squire, Sanders & Dempsey, by Messrs. John Lansdale, Jr., Alan P. Buchmann, and James H. Woodring, 1800 Union Commerce Building, Cleveland, Ohio 44115, on behalf of the Applicant.

Messrs. Robert D. Hart, John F. Harkins, and William Schatz, 213 City Hall, Cleveland, Ohio, on behalf of the City of Cleveland, Intervenor.

Mr. Lawrence V. Cox, Director of Law, 6161 Engle Road, Brook Park, Ohio, on behalf of the City of Brook Park, Intervenor.

Messrs. Weston, Hurd, Fallon, Sullivan & Paisley, by Mr. Jerome S. Kalur, 2500 Terminal Tower, Cleveland, Ohio, on behalf of the Sierra Club, Intervenor.

Messrs. Thompson, Hine & Flory, by Messrs. William H. Wallace and Alan R. Lepene, Special Counsel, 1100 Na-

tional City Bank Building, Cleveland, Ohio, on behalf of the City of Rocky River, Intervenor.

Ms. Daisy G. Collins, 1404 East Ninth Street, Cleveland, Ohio, on behalf of The Greater Cleveland Welfare Rights Organization, Inc., Intervenor.

Mr. Patrick A. Gareau, Director of Law, 21330 Center Ridge Drive, Rocky River, Ohio, and Mr. Gerald P. Wadkowski, Special Counsel, 85 East Gay Street, Columbus, Ohio, on behalf of the Cities of Westlake and Strongsville, Intervenors.

Honorable George E. Mastics, Ohio House of Representatives, 1001 Terminal Tower, Cleveland, Ohio, on his own behalf and on behalf of his electoral district, Intervenors.

Mr. William J. Brown, Attorney General of the State of Ohio, by Mr. Charles S. Rawlings and Ms. Cheryl Hachman, Assistant Attorneys General, 111 North High Street, Columbus, Ohio, on behalf of the staff of The Public Utilities Commission of Ohio.

COMMISSION REVIEW AND DISCUSSION:

In its opinion in *Cleveland Electric Illuminating Company v. Public Utilities Commission, supra,* the Supreme Court of Ohio affirmed this Commission's Opinion and Order of November 28, 1973 in certain respects and reversed it in others. For the purposes of this Opinion and Order on remand, as will become apparent hereinafter, there appears to be no need for this Commission to discuss or act upon a number of the points set forth in the Supreme Court's opinion, since it is clear that, on any interpretation of the Supreme Court's decision, applicant is entitled to the full rate increase requested in the application.

Although the Supreme Court dealt with several rate base items, deciding some rate base issues in applicant's favor and some adversely to it, with respect to only one rate base question did it reach a conclusion substantively adverse to applicant in the sense that it would result in a reduction of the rate base found appropriate by this Commission in its Opinion and Order of November 28, 1973. This relates to the question of properly crediting the allowance for working capital with an offset for customers' contributions in the form of tax accruals. In this respect, the ninth paragraph of the syllabus of the Supreme Court's opinion reads as follows:

> "9. Customers' contributions in the form of accruals for the payment of taxes which will be constant with reasonable certainty and which are available for investments in materials and supplies or for use as working capital should be used as an offset on the allowance for working capital. (*Cincinnati v. Pub. Util. Comm.*, 161 Ohio St. 395, approved and followed)."

Thus, if we were to consider this issue alone, it is apparent that the rate base as previously found by this Commission must be reduced. As the Supreme Court noted in its opinion, however, the evidence as to the amount of any such reduction is conflicting. It is apparent that the most conservative possible approach to this issue, i.e. the approach most adverse to the interests of the applicant, would be the elimination of *all* working capital from the statutory rate base. On the other hand, the Supreme Court expressly held that the value of the filled land at the applicant's Lake Shore Power Plant is included in the rate base. There was no dispute as to the value of that property, but only as to its includability. Thus, under the Supreme Court's

decision, it is plain that that value, $418,000, should be added to the value of the Company's land and land rights. This would result in a statutory rate base for the purposes of this proceeding of $1,155,717,000 as indicated by the table below:

Land and land rights	$ 37,507 (000's)
RCNLD of property	1,118,210
Working capital	-0-
Rate Base	$1,155,717

It will be noted that this computation does not take into consideration the decision of the Supreme Court as to the computation of the materials and supplies component of working capital which would tend to increase the rate base above that indicated. As discussed hereinafter, there is no need for the Commission to pursue its analysis of this question further at this time.

In so far as rate of return is concerned, the decision of the Supreme Court would, ordinarily, require a reevaluation of all of the components of the cost of capital which this Commission normally considers in determining a fair rate of return. Again, as will become clear hereinafter, there is no need for the Commission to make such a determination at this point. It is sufficient to note that the Supreme Court concluded that the inclusion of deferred credits at zero cost in determining a rate of return of 7.05% was unlawful. If we exclude the deferred credits component of the capital structure from the computation, holding all other elements constant, the effect upon the determination of the cost of capital is as follows:

	Percent of Total	Cost	Weighted Cost
Common	40.4	8.5	.034340
Preferred	6.8	7.4	.005032
Debt	52.8	6.5	.034320
	100.0		.073692

It will be observed that this computation does no more than eliminate the deferred credits at zero cost, restating the remaining components of capital structure as percentages of the total and, of course, developing the resulting weighted cost. No changes have been made in the assigned cost of the various components from those utilized in the staff approach originally adopted by this Commission in its Opinion and Order of November 28, 1973. Obviously, in view of the Supreme Court's decision on the various rate of return issues, this is the computation which is most adverse to the position of the applicant. It results, as indicated, in a rate of return of 7.37%.

Application of a rate of return of 7.37% to the minimum rate base discussed above will result in an allowable dollar return in the amount of $85,176,343 which, when added to the allowable annual expenses of applicant for the purposes of this proceeding as previously determined by the Commission, would produce allowable gross annual revenue, with due regard to the income tax effect of the increase, of $319,721,729.

In its application, however, applicant requested an increase in rates which would produce allowable annual revenue of $319,473,248 (S.R. p. 8), which is less than the amount determined above. The Commission is of the opinion that the amount requested constitutes implicit acknowledgment by applicant that such revenues are suf-

ficient to meet its normal expenses and carry on its operations [See *Dayton Power and Light Company,* Case No. 73-166-Y (February 63, 1975)] and that the rate of return which such revenues would produce should be considered the fair rate of return for purposes of this proceeding. Accordingly, the Commission is of the opinion that there is no need for further analysis either of rate base or rate of return which otherwise might be required by the Supreme Court's decision.

The only remaining question relates to certain tariff issues heretofore determined by this Commission in its Opinion and Order of November 28, 1973. Specifically, the regulations in issue here deal with the time of access to customer premises, itemization of charges for special construction, and voltage variations, together with the fuel adjustment clause and certain promotional tariffs. In its opinion the Supreme Court concluded that, when considering an application for a rate increase, this Commission "may not extend its inquiry to matters not put in issue by the applicant and not related to the rates which are the subject of the application." The Supreme Court, however, expressly refrained from attempting to categorize which of the five indicated matters, if any, fall within the realm of the Company's application or have an effect upon the rates. The Commission is of the opinion, and so finds, that the fuel adjustment clause and the promotional tariffs clearly "have an effect upon the rates" and the record supports the disposition made by this Commission on those questions in its Opinion and Order of November 28, 1973 which, to that extent, is incorporated herein.

The other matters referred to in the opinion of the Supreme Court in this connection present a much closer question and, if this proceeding were at a different stage it is possible that different result might be required. The record, however, reflects that the precise language in question with respect to each of these regulations was the result of discussions between the applicant and the Commission's staff and that there is evidence in the record to support the changes required by the Commission. In view of the fact that this matter has been pending before the Commission since October 7, 1971, and that there is no indication in the record that the Commission's determination on these points has been or will be prejudicial to applicant, the Commission will adopt the pertinent portions of its Opinion and Order of November 23, 1973 on these issues.

FINDINGS OF FACT:

From evidence of record in this proceeding, the Commission finds that:

1. The value of applicant's electric property used and useful for the service and convenience of the public within the service area encompassed by this application, as of the date certain June 30, 1971, is not less than $1,155,717,000 and that, for the purposes of this proceeding on remand, no allowance for working capital will be made, resulting in a rate base for this proceeding of $1,155,717,000.

2. For the twelve month period ending December 31, 1971, the test period in this proceeding, the revenues, expenses and income available for fixed charges from the rates for electric service then being charged and collected in the area involved in this proceeding, are $268,930,886, $209,153,155, and $59,777,731, respectively.

3. This net annual compensation of $59,777,731 represents a 5.17 percent rate of return on a rate base of $1,155,717,000, which is insufficient to provide applicant with reasonable compensation for the

electric service rendered to customers in the area in question.

4. The application herein constitutes a recognition by applicant that a rate of return of somewhat less than 7.37%, i.e. a rate of return which would produce the requested increase, is fair and reasonable and is sufficient to provide applicant just compensation and return on the value of the property used and useful in furnishing the service described in the application.

5. Applicant has recognized that a dollar return in the amount of $85,050,160 will provide it with reasonable compensation for the electric service rendered to customers in the territory affected by this application.

6. The annual expenses of applicant for the purposes of this proceeding are $234,423,088.

7. The gross annual revenue to which applicant is entitled for the purpose of this proceeding is the sum of the amounts set forth in Findings 5 and 6, or $319,473,248.

8. The applicant should submit tariff schedules consistent with this Opinion and Order and cancel and withdraw its presently effective tariffs.

CONCLUSIONS OF LAW:

1. Pursuant to the mandate of the Supreme Court of Ohio in *Cleveland Electric Illuminating Company v. Public Utilities Commission*, 42 Ohio St. 2d 403 (1975), the applicant should be authorized to cancel and withdraw its presently effective tariff provisions on file with this Commission and to file tariff provisions consistent with the Commission's Discussion and Findings set forth above.

2. The effective date of the new tariffs shall be the first billing period after the Commission's approval of the tariffs filed pursuant to this Order.

ORDER:

It is, therefore,

ORDERED, That the applicant be, and hereby is, authorized to file tariffs consistent with the Discussion and Findings set forth above and to cancel and withdraw its present tariffs. It is, further,

ORDERED, That the tariff sheets authorized herein, should be submitted for approval by the Commission. Upon receipt of two (2) complete copies of said tariffs conforming to this opinion and order, the Commission will review and approve same by entry. It is, further,

ORDERED, That the effective date of the new tariff should be the first billing following Commission approval of the tariffs filed pursuant to this order. Applicant should notify each of its customer of the increase in rates and changes authorized herein by insert or attachment to this first billing. The proposed notice shall be submitted to the Commission when applicant files its tariffs for approval. It is further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

The Public Utilities Commission of Ohio

C. Luther Heckman
Chairman

Sally W. Bloomfield
David Sweet
Commissioners

APPENDIX E

Judgment of the Supreme Court of Ohio

(Dated June 11, 1975)

No. 74-272

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO
CITY OF COLUMBUS.

CITY OF CLEVELAND,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

APPEAL FROM THE PUBLIC UTILITIES COMMISSION OF OHIO

This cause, here on appeal from the Public Utilities Commission, was heard in the manner prescribed by law. On consideration thereof, the order of the Public Utilities Commission is affirmed in part and reversed in part for the reasons stated in the opinion herein, and cause remanded to the Commission for further proceedings in accordance with such opinion.

It is ordered that a mandate issue to the Public Utilities Commission of Ohio to carry this judgment into execution.

APPENDIX F

Entry of the Supreme Court of Ohio Denying Motion for Rehearing

(Dated June 24, 1975)

Nos. 74-276, 74-272 and 74-156

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

It is ordered that the motion for clarification filed by Cleveland Electric Illuminating Company, appellant in case No. 74-276, be and hereby is overruled.

It is further ordered that the motion for rehearing filed by the Public Utilities Commission of Ohio, appellee in case No. 74-276, be and hereby is overruled.

It is further ordered that the motion for rehearing filed by the City of Cleveland, appellant in case No. 74-272, be and hereby is overruled.

It is further ordered that the stay of the order of the Public Utilities Commission of Ohio dated June 16, 1975, in case No. 75-437-EL-ATA, granted by order of this Court dated June 20, 1975, is hereby continued and remains in full force and effect pending a decision by the Public Utilities Commission pursuant to the opinion and order of this Court dated June 11, 1975.

APPENDIX G

Evidence of Cleveland Electric Illuminating Company's Interstate Commerce

Before The
PUBLIC UTILITIES COMMISSION OF OHIO

Case No. 71-634 Y

RE: THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
DIRECT TESTIMONY OF HARBANS S. CHHABRA

Part I. *Qualifications*

Q. Please state your name and address. A. My name is Harbans S. Chhabra. I reside at 14809 Dixon Court, Woodbridge, Virginia 22191.

Q. What is your occupation? A. I am employed by Van Scoyoc & Wiskup, Inc., Public Utility Consultants, with offices at 1015 18th Street, N. W., Washington, D. C. 20036.

Q. Please outline your educational background. A. I was graduated from Howard University, Washington, D. C., in 1967 with the degree of Bachelor of Science in Mechanical Engineering. Subsequently, I took several graduate courses in the field of management from the American University and received a graduate certificate in 1971.

Q. What professional certifications do you hold? A. I am a Registered Professional Engineer of the State of Virginia.

Q. Are you a member of any professional organizations? A. Yes, I am a member of the District of Columbia Society and the National Society of Professional Engineers.

Q. How long have you worked in the public utility field? A. I have been engaged in utility work for five years. My work experience in this field started in June 1967 when I became an employee of a local gas utility company.

Q. Will you state by whom you were employed and in general your responsibilities and duties? A. I was with Washington Gas Light Company as a Staff Engineer for five years involving two different areas of gas distribution system. In the Department of Gas Supply, I specified gas measurement and handling equipment as well as controls for the gas system. In this activity, my assignments also included gas measurement, winter peaking service, ascertainment of gas quality, odorization, and maintenance of the utility plant. In the Research and Utilization Department I was responsible for an important research project entitled, "Causes and Prevention of Heating Equipment Failure". Other duties included design and specification of heating, venting, and air conditioning systems; total energy system; study of fuel cells; and test and evaluation of gas appliances. I was self employed from June 1972 until joining the staff of Van Scoyoc & Wiskup, Inc. in April, 1973 as a Regulatory Engineer.

DIRECT TESTIMONY OF HARBANS S. CHHABRA

Part II: *Analysis of Gross Deliveries of Electricity During 1971*

Q. Mr. Chhabra, are you generally familiar with the energy flows of the Cleveland Electric Illuminating Company as shown by the evidence before this Commission in Case No. 71-634 Y? A. Yes, I am. I also examined data available at the Federal Power Commission.

Q. Did you prepare Exhibit No. ..... (HSC) entitled "Analysis of Gross Deliveries of Electricity during 1971"? A. Yes.

Q. What is the purpose of the exhibit? A. The purpose of this exhibit is to show the Cleveland Electric Illuminating Company's activity in interstate as well as intrastate transactions.

Q. Please describe Schedule 1 of Exhibit No. ..... (HSC)? A. Schedule 1 is designed to show deliveries of electricity under two categories. They are:

1. Non Jurisdictional Deliveries and Deliveries other than under State Commission's Retail Rate Schedules
2. Retail Deliveries subject to State Commission's Jurisdiction

In column (2) the FPC Rate Schedules are specified where applicable.

During the test year (1971) 22.67% of the total deliveries of 17,442,706,707 Kwh were under the above mentioned category 1 and 77.33% were under the State Commission's retail rate schedules.

Q. Please describe Schedules 2, 3, and 4? A. These schedules are copies of certain sheets in the FPC Forms 1 and 12 for 1971 showing sales and interchanges with other electric systems. Some of the numbers on Schedule 1 of my exhibit were taken from Schedules 2, 3, and 4.

Q. What does Schedule 5 show? A. This schedule consists of two pages also from the Company's FPC Form 1 for 1971. It shows total sales of electricity by rate schedules and includes sales for resale to the City of Cleveland. This was another source of information for my Schedule 1.

Q. Please explain Schedules 6 and 7? A. Schedules 6 and 7 both consist of two pages each and are copies from Company's FPC Form 1 for 1972. These schedules also show sales of electricity by rate schedules and include sales for resale to Toledo Edison Company and City of Cleveland under FPC Rate Schedules 9 and 7 respectively.

The purpose of these Schedules is to show the Cleveland Electric Illuminating Company's continued activity in deliveries of electricity under Category 1 of my Schedule 1, even after the test year.

Q. What is Schedule 8 intended for? A. This schedule consists of three pages copied from FPC's "Index of Filed Electric Rate Schedules". It shows designated Rate Schedule Numbers for the Cleveland Electric Illuminating Company and other electric systems.

Before The

Public Utilities Commission of Ohio

The Cleveland Electric Illuminating Company

Case No. 71-634 Y

ANALYSIS OF GROSS DELIVERIES OF ELECTRICITY DURING 1971

Van Scoyoc & Wiskup, Inc.
Public Utility Consultants
1015 18th Street, N.W.
Washington, D.C. 20036

Case No. 73-634 Y

The Cleveland Electric Illuminating Company

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Interchange Power 1971	4
Sales of Electricity by Rate Schedules 1971	5
Sales of Electricity by Rate Schedules 1972	6
Sales for Resale 1972	7
Index of Filed Electric Rate Schedules	8

Schedule 1
Page 1 of 2

Public Utilities Commission of Ohio
Case No. 71-634 Y

The Cleveland Electric Illuminating Company

GROSS DELIVERIES OF ELECTRICITY
FOR YEAR ENDED DECEMBER 31, 1971

Line No.	Description (1)	1971 FPC Rate Schedule (2)	1971 Kwh Delivered (3)	1971 Percent (4)
1	NON JURISDICTIONAL DELIVERIES			
2	AND DELIVERIES OTHER THAN UNDER			
3	STATE COMMISSION'S			
4	RETAIL RATE SCHEDULES			
5	Sales for Resale			
6	City of Cleveland Department			
7	of Public Utilities Total	7*	127,733,342	0.732%
8	Toledo Edison	9*	-	-
9	Total Sales for Resale		127,733,342	0.732
10	Sales and Interchange With			
11	Other Electric Systems			
12	Ohio Edison	2	499,849,000	2.865
13	Ohio Power	1	68,567,000	0.394
14	Ohio Edison		2,356,434,000	13.509
15	Total Ohio Edison & Ohio Power		2,924,850,000	16.768
16	Pennsylvania - New Jersey - Maryland Group	4	350,153,000 83,454,000	2.007 0.478
17	Total PJM Group		433,607,000	2.485
18	Industrial Companies			
19	Union Carbide Corporation **		19,475,000	0.112

7 _____

* Designated FPC Rate Schedules (p. 412 Form 1, 1972)

** Delivery under an interchange agreement.

Schedule 1
Page 2 of 2

Public Utilities Commission of Ohio
Case No. 71-634 Y

The Cleveland Electric Illuminating Company

GROSS DELIVERIES OF ELECTRICITY
FOR YEAR ENDED DECEMBER 31, 1971 (Contd)

Line No.	Description (1)	1971 FPC Rate Schedule (2)	1971 Kwh Delivered (3)	1971 Percent (4)
1	Other Sales to Public Authorities			
2	Contracts		281,910,432	1.616%
3	Public Streets and			
4	Highway Lighting			
5	Public Street Lighting		121,130,960	0.694
6	Traffic Control Lighting		11,959,491	0.068
7	Total Lighting		133,090,451	0.762
8	Sales to Railroads and Railways			
9	Cleveland Transit System		32,828,138	0.188
10	TOTAL		3,953,494,363	22.666%
11	RETAIL DELIVERIES SUBJECT TO			
12	STATE COMMISSION'S JURISDICTION			
13	Sales at Retail Rate			
14	Schedules to Ultimate Consumers			
15	Residential Sales		3,530,654,580	20.241%
16	Commercial Sales		3,144,639,662	18.028
17	Industrial Sales		6,813,918,102	39.065
18	TOTAL		13,489,212,344	77.334
19	TOTAL GROSS DELIVERIES		17,442,706,707	100.000%

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Source Form 1

Annual report of THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

Schedule 2
Page 1 of 2
Year ended December 31, 1971

ELECTRIC ENERGY ACCOUNT

Report below the information called for concerning the disposition of electric energy generated, purchased, and interchanged during the year

Line No.	Item (a)	Kilowatt-hours (b)
1	**SOURCES OF ENERGY**	
2	Generation (excluding station use):	
3	Steam	15,120,564,000
4	Nuclear	-
5	Hydro—conventional	-
6	Hydro—pumped storage	460,556,000
7	Other	-
8	Less energy for pumping	(627,600,000)
9	Net generation	14,953,520,000
10	Purchases	161,087,000
11	Interchanges: In (gross) 2,440,056,000 Kwh.	
12	Out (gross) 2,439,698,000 Kwh.	
13	Net	358,000
14	Transmission for/by others (wheeling): Received Kwh.	
15	Delivered Kwh.	
16	Net	
17	Total	15,114,965,000
18	**DISPOSITION OF ENERGY**	
19	Sales to ultimate consumers (including interdepartmental sales)	13,937,041,365
20	Sales for resale (Temporary emergency sale to City of Cleveland Plant)	127,733,342
21	Energy furnished without charge	-
22	Energy used by the company (excluding station use):	
23	Electric Hydroelectricity and Steam	33,978,879
24	Energy losses:	
25	Transmission and conversion losses	Not Available
26	Distribution losses	" "
27	Unaccounted for losses	" "
28	Total energy losses	1,016,211,414
29	Energy losses as percent of total on line 17 6.7 %	
30	TOTAL	15,114,965,000

MONTHLY PEAKS AND OUTPUT

1. Report hereunder the information called for pertaining to maximum peaks established monthly (in kilowatts) and monthly output (in kilowatt-hours) for the combined sources of electric energy of respondent.
2. Monthly peak col. (b) should be respondent's maximum hr. load as measured by the sum of its coincidental net generation and purchases plus or minus net interchange, minus temporary deliveries (not interchange) of emergency power to another system. Monthly peak excluding such emergency deliveries should be shown in a footnote with a brief explanation as to the nature of the emergency.
3. State type of monthly peak reading (instantaneous 15, 30, or 60 minutes integrated).
4. Monthly output should be the sum of respondent's net generation for load and purchases plus or minus net interchange and plus or minus net transmission or wheeling. Total for the year should agree with line 17 above.
5. If the respondent has two or more power systems not physically interconnected, the information called for below should be furnished for each system.

.....CEI.....System

Line No.	Month (a)	MONTHLY PEAK --Estimated: Kilowatts** (b)	Day of week (c)	Day of month (d)	Hour (clock)	Type of reading (f)	(Thousands) Monthly output (kwh) (See Instr. 4) ** (g)
31	January	2,359,000	Thursday	28	7 pm	60-Minute	1,302,643
32	February	2,417,000	Monday	1	2 pm	" "	1,208,377
33	March	2,330,000	Monday	8	12 noon	" "	1,337,165
34	April	2,257,000	Thursday	29	11 am***	" "	1,225,698
35	May	2,391,000	Wednesday	19	2 pm***	" "	1,221,035
36	June	2,792,000	Monday	28	2 pm***	" "	1,336,052
37	July	2,553,000	Thursday	8	2 pm***	" "	1,268,377
38	August	2,488,000	Tuesday	10	2 pm***	" "	1,229,688
39	September	2,616,000	Wednesday	8	3 pm***	" "	1,237,902
40	October	2,298,000	Monday	4	1 pm***	" "	1,223,058
41	November	2,313,000	Tuesday	30	6 pm	" "	1,235,016
42	December	2,305,000	Wednesday	22	7 pm	" "	1,298,031
						TOTAL	15,111,[illegible]

**Including interruptible loads

* In some cases there may be unavoidable recording of purchases and exchanges as "check-line," also of short duration. In the way of net energy of the reporting system, whereas no measurement for determination of the amount involved by the wholesale may be obtainable. In these cases supplementary note, however, should be furnished, which indicates, among other things, the relative magnitude of the derivation from known sources of such [illegible]. If the amounts involved in arrangements of such nature are unusual but nothing can be separately rate with [illegible] and are enumerated, give the amount and basis

Schedule 2
Page 2 of 2

Power System Statements of.....The Cleveland Electric Illuminating Co.....for the Year Ended December 31, 1971

Schedule 8—Continued

PART B.—OTHER ENERGY TRANSFERS WITH ELECTRIC UTILITY SYSTEMS AND RECEIPTS FROM INDUSTRIAL COMPANIES

(See Page 19 for General Instructions)

1. Report in column 5 all energy (except that reported in Schedule 8, Part A, column 5) received from other electric utility systems and industrial companies.
2. Report in column 6 the amounts of energy delivered for resale to class I and class II systems which obtained a part of their power supply during the year from their own generating plants. Energy delivered to industrial establishments should be reported in Schedule 10 and not in this schedule.
3. Show all points of interconnection through which energy transfers (which would properly be included in Part B) could have been made, whether there were any transfers during the year or not. Where no transfers were made the entries in columns 5 and 6 should be zero.
4. The totals shown on line 40, columns 5 and 6, should be carried over to line 13, columns 3 and 4, respectively, of schedule 14.

Name of Other Company or System (1)	Transfer Point (2)	Coordinate, Location or Symbol on Map (3)	Flow (F) or Wheeling (W) Transfer (4)	Energy Received (Footnote 1) (Kilowatt-hours) (5)	Energy Delivered (Footnote 2) (Kilowatt-hours) (6)
(a) PRIVATE SYSTEMS					
Ohio Edison Co.	Summit Co.	AV			
	Lake, Sheffield Twp., & Richfield Twp., Ohio	JR PV	W	1,630,429,000	2,924,850,000
Ohio Power Company	Cannaburg Twp. Ohio	JR	W	1,435,665,000	- 0 -
Pennsylvania - New Jersey Maryland Group	Ohio - Pa. State Line	JS	W	449,493,000	433,607,000
(b) INDUSTRIAL COMPANIES					
Union Carbide Corp.		AT	W	23,830,000	19,475,000*

* Return of energy under an Interchange Agreement.

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Schedule 11

ENERGY TRANSFERRED TO OR ACROSS A STATE LINE OR INTERNATIONAL BOUNDARY DURING THE YEAR

1. In this schedule show the amounts of energy flow to or across a State line or international boundary during the year, including energy to and from the respondent's facilities.

2. Report Total amounts of energy so transferred in each direction over each line used. Do not report Net transfers. Where transfers were made over a number of circuits, estimates (noted "Est."), of the amounts transferred may be furnished, if measured quantities are not available.

3. Where the transfers reported were from one System Company to another System Company operating in an adjoining State, these company names should also be given in columns 1 and 3. "System" companies are those listed under item 6-C, page 3.

Transferred From—		Transferred To—		Line Designation		Amount Transferred (Kilowatt-Hours)
Company (1)	State (2)	Company (3)	State (4)	From— (5)	To— (6)	(7)
Cleveland Electric Illuminating Company	Ohio	Pennsylvania - New Jersey - Maryland Group	Pa.	Ashtabula	Erie West	347,366,000
Pennsylvania - New Jersey - Maryland Group	Pa.	Cleveland Electric Illuminating Company	Ohio	Erie West	Ashtabula	192,853,000

INTERCHANGE POWER (Included in Account 555)

1. Report below all of the kilowatt-hours received and delivered during the year. For receipts and deliveries under interchange power agreements, show the net charge or credit resulting therefrom.

2. Provide subheadings and classify interchanges as to (1) Associated Utilities, (2) Nonassociated Utilities, (3) Associated Nonutilities, (4) Other Nonutilities, (5) Municipalities, (6) Cooperatives, and (7) Other Public Authorities. For each interchange across a state line place an "X" in column (b).

3. Particulars of settlements for interchange power shall be furnished in a footnote or supplemental schedule which includes the name of each company, the nature of the transaction, and the dollar amounts involved. If settlement for any transaction also includes credit or debit amounts other than for increment generation expenses, show such other component amounts separately, in addition to debit or credit for increment generation expenses, and give a brief explanation of the factors and principles under which such other component amounts were determined. If such settlement represents the net of debits and credits under an interconnection, power pooling, coordination, or other such arrangement, submit a copy of the annual summary of transactions and billings among the parties to the agreement. If the amount of settlement reported in this schedule for any transaction does not represent all of the charges and credits covered by the agreement, furnish in a footnote a description of the other debits and credits and state the amounts and accounts in which such other amounts are included for the year.

Summary of Interchange According to Companies and Points of Interchange

Line No.	Name of company (a)	Interchanges across State lines (b)	FPC Rate Schedule Number (c)	Point of Interconnection (d)	(kV) Voltage at which Interchanged (e)	Kilowatt-Hours (b) Received (f)	Delivered (g)	Net difference (h)	(b) Amount of settlement (i)
1	Nonassociated Utilities								$
2	Ohio Edison Company			Summit County Line, Ohio,					
3				Sheffield Twp., Ohio, and					
4			2	Richfield Twp., Ohio	138 and 345	428,917,000	499,049,000	(70,132,000)	1,297,935
5	Ohio Power Company		1	Canaan Twp., Ohio	345	135,177,000	68,367,000	66,810,000	649,885
6	Pennsylvania-New Jersey-								
7	Maryland Group	X	4	Ohio-Pa. State Line	345	201,317,000	350,153,000	(148,836,000)	880,047
8	(a) See Note (a) on Page 328.								
9	Other Nonutilities								
10	Union Carbide Corporation	-	-	Ashtabula Twp., Ohio	13.8	23,830,000	19,668,000	4,162,000	18,743
11									
12									
13									
14	(b) See Page 328a.								
15									
16									
17									
18									
19									
20									
21									
22									
23									

	Amount of Settlement
Delivered To:	
Ohio Edison Company	$ 960,989
	(2,199,536)
	(1,902,301)
	(1,297,853)

	Amount of Settlement
Received From:	
Ohio Power Company	$ 649,885
PJM Group	$ 820,037
Union Carbide Corporation	$ 18,783

*These kWr are deliveries of energy between CEI and Ohio Edison Company under an Agreement dated February 25, 1969. One of the provisions in this Agreement provides for mutual back-up responsibility of the parties in the event of scheduled outage of either unit and the other unit is in service, the party on whose system such outage exists shall be entitled to order and receive capacity up to 300,000 kW together with associated energy. It is contemplated that deliveries of this type of energy will be equal and offsetting over any reasonable period of time. Deliveries to either company are to be compensated for by delivery in kind. For accounting purposes the kWr have been evaluated at 3.0 mills per kWr.

	Received From:	Delivered To:
Ohio Edison Company	85,819,000 kWr	88,760,152
	146,498,000 kWr*	4,197,464
	496,917,000 kWr	13,299,819

	Received From:	Delivered To:
Ohio Power Company	135,177,000 kWr	61,139,993
PJM Group	201,517,000 kWr	13,482,231
Union Carbide Corporation	23,850,000 kWr*	18,783

*19,455,000 kWr delivered to repay a like amount received. The remaining 8,165,000 kWr have been evaluated at 4.5 mills per kWr. Sales of 138,825,000 kWr to Union Carbide Corporation are included in Revenue Account 482.

Source Form 1

Annual report of THE CLEVELAND ELECTRIC ILLUMINATING COMPANY ..... Year ended December 31, 1972

SALES OF ELECTRICITY BY RATE SCHEDULES

1. Report below for each rate schedule in effect during the year the Kwh of electricity sold, revenue, average number of customers, average Kwh per customer, and average revenue per Kwh.

2. Provide a subheading and total for each prescribed operating revenue account in the sequence followed in Schedule entitled "Electric Operating Revenues," page 400. If the sales under any rate schedule are classified in more than one revenue account list the rate schedule and sales data under each applicable revenue account subheading.

3. Where the same customers are served under more than one rate schedule in the same revenue account classification (such as a general residential schedule and an off peak water heating schedule), the entries in column (d) for the special schedule should denote the duplication in number of reported customers.

4. The average number of customers should be the number of bills rendered during the year divided by the number of billing periods during the year (12 if all billings are made monthly).

5. For any rate schedule having a fuel adjustment clause state in a footnote the estimated additional revenue billed pursuant thereto.

Line No.	Number and Title of Rate Schedule (a)	Kwh Sold (b)	Revenue (c)	Average Number of Customers (d)	Kwh of Sales per Customer (e)	Revenue per Kwh Sold (f)
			$			Cents
1	(440) Residential Sales					
2	1 - General Residential	2,616,699,446	73,191,902	536,937	4,873	2.80
3	2 - Large Residential	660,921,478	13,718,155	53,268	12,407	2.08
4	3 - Residential Space Heating	27,903,400	462,898	1,071	26,054	1.66
5	5 - All-Electric Apartment Suite	8,814,360	122,906	332	25,344	1.46
7	6 - General Commercial s-c	68,172,331	2,398,316	8,540	7,983	3.52
8	7 - General Commercial d-c	8,519	373	2	4,260	4.38
9	8 - Large Commercial s-c	343,810,729	2,951,067	341	421,732	2.05
10	10 - Special Low Load Factor Commercial	897,025	44,269	84(d)	10,679	4.93
12	17 - Private Drive and Area Lighting	-	20	-	-	-
14	19 - Outdoor Lighting	3,827,272	251,098	2,906(d)	1,317	6.56
16	TOTAL	3,530,654,580	93,130,996	603,481	5,850	2.64
18	(442) Commercial & Industrial Sales					
21	Commercial:					
23	6 - General Commercial s-c	529,502,055	17,549,516	37,039	14,161	3.35
24	7 - General Commercial d-c	1,253,043	47,768	85	14,742	3.81
25	8 - Large Commercial s-c	1,956,009,235	42,131,826	5,715	342,259	2.15
26	9 - Large Commercial d-c	47,851,522	1,065,460	94	509,059	2.23
27	10 - Special Low Load Factor Commercial	1,409,543	139,978	352(d)	4,004	9.93
29	11 - Industrial	830,051,959	5,962,779	80	10,751,299	1.39
30	12 - Large Industrial	134,678,080	1,383,250	2	67,339,040	1.21
31	15 - All-Electric Large General Service	43,094,372	657,467	66	652,339	1.53
33	17 - Private Drive and Area Lighting	-	-	-	-	-
34	18 - Emergency	99,779	3,725	5	11,956	6.23
35	Outdoor Lighting	25,770,078	1,278,499	6,316(d)	4,080	4.95
37	TOTAL COMMERCIAL	3,144,639,662	70,216,167	49,714	63,255	2.23

Schedule 5
Page 2 of 2

ANNUAL REPORT of The Cleveland Electric Illuminating Company Year Ended December 31, 1972

	(a)	(b)	(c)	(d)	(e)	(f)
45	Industrial:					
47	6 - General Commercial a-c	40,808,880	1,978,000	2,586	23,585	3.37
48	7 - General Commercial d-c	4,480	805	1	4,480	5.43
49	8 - Large Commercial a-c	1,296,200,698	27,682,132	2,877	525,256	2.1
50	9 - Large Commercial d-c	1,300,628	36,571	3	406,876	2.73
51	10 - Special Low Load Factor					
52	Commercial	2,813,280	306,187	319(d)	8,819	10.79
53	11 - Industrial	1,516,732,983	21,335,463	308	10,248,195	1.41
54	12 - Large Industrial	3,606,372,500	38,516,208	29	120,357,672	1.07
55	15 - Large Low Load Factor	1,622,576	45,195	2	811,288	2.79
56	15 - All-Electric Large General					
57	Service	63,536,979	985,580	41	1,599,682	1.55
58	17 - Private Drive and Area					
59	Lighting	33,120	820	1	33,120	2.50
60	19 - Outdoor Lighting	8,815,056	423,905	1,132(d)	7,787	4.81
61	Other - Contracts	225,633,088	1,878,587	12	22,969,817	.83
62						
63	TOTAL INDUSTRIAL	6,813,918,382	92,519,123	7,388	959,572	1.36
64						
65	TOTAL COMMERCIAL &					
66	INDUSTRIAL	9,958,557,760	162,735,298	56,815	175,280	1.63
67						
68	(444) Public Street & Highway					
69	Lighting					
70						
71	Public Street Lighting	121,130,560	5,109,898	380	865,221	4.22
72	Traffic Control Lighting	11,959,491	296,405	122	98,029	2.43
73						
74	TOTAL	133,090,051	5,406,303	262	507,979	4.06
75						
76	(445) Other Sales to Public					
77	Authorities					
78						
79	Contracts Total	288,580,832	3,431,795	286	1,368,497	1.22
80						
81	(446) Sales to Railroads &					
82	Railways					
83						
84	Cleveland Transit System	32,828,138	501,768	1	32,828,138	1.53
85						
86	(447) Sales for Resale					
87						
88	City of Cleveland					
89	Dept. of Public Utilities	127,733,342	1,252,822	1	127,733,342	.98
90						
91	TOTAL SALES OF ELECTRICITY	10,660,770,707	266,458,975	660,766	23,286	1.89

Source Form 1

Schedule 6
Page 1 of 2

Annual report of THE CLEVELAND ELECTRIC ILLUMINATING COMPANY Year ended December 31, 1972

SALES OF ELECTRICITY BY RATE SCHEDULES

1. Report below for each rate schedule in effect during the year the Kwh of electricity sold, revenue, average number of customers, average Kwh per customer, and average revenue per Kwh.

2. Provide a subheading and total for each prescribed operating revenue account in the sequence followed in Schedule entitled "Electric Operating Revenues," page 409. If the sales under any rate schedule are classified in more than one revenue account list the rate schedule and sales data under each applicable revenue account subheading.

3. Where the same customers are served under more than one rate schedule in the same revenue account classification (such as a general residential schedule and an off peak water heating schedule), the entries in column (d) for the special schedule should denote the duplication in number of reported customers.

4. The average number of customers should be the number of bills rendered during the year divided by the number of billing periods during the year (12 if all billings are made monthly).

5. For any rate schedule having a fuel adjustment clause state in a footnote the estimated additional revenue billed pursuant thereto.

Line No.	Number and Title of Rate Schedule (a)	Kwh Sold (b)	Revenue (c)	Average Number of Customers (d)	Kwh of Sales per Customer (e)	Revenue per Kwh Sold (f)
			$			Cents
1	(440) Residential Sales					
2	1 - General Residential	2,739,088,380	77,043,897	539,544	5,077	2.81
3	2 - Large Residential	713,417,051	15,031,445	55,749	12,797	2.11
4	3 - Residential Space Heating	33,229,270	561,829	1,227	27,082	1.69
5	5 - All-Electric Apartment					
6	Suite	10,601,900	159,517	428	24,771	1.50
7	6 - General Commercial a-c	71,144,355	2,508,108	8,478	8,392	3.53
8	7 - General Commercial d-c	7,195	329	2	3,598	4.57
9	8 - Large Commercial a-c	157,524,884	3,267,153	383	411,292	2.07
10	10 - Special Low Load Factor					
11	Commercial	1,017,962	45,404	82(d)	12,414	4.46
12	19 - Outdoor Lighting	4,334,099	272,306	3,330(d)	1,302	6.30
13						
14	TOTAL	3,730,365,087	98,890,788	609,223	6,123	2.65
15						
16	(442) Commercial & Industrial					
17	Sales					
18						
19	Commercial:					
20						
21	6 - General Commercial a-c	539,935,218	18,220,356	37,533	14,386	3.37
22	7 - General Commercial d-c	1,286,976	48,916	82	15,695	3.80
23	8 - Large Commercial a-c	2,051,911,389	44,589,644	5,969	343,819	2.17
24	9 - Large Commercial d-c	47,871,648	1,052,903	90	531,907	2.20
25	10 - Special Low Load Factor					
26	Commercial	1,584,950	48,070	353(d)	4,490	9.34
27	11 - Industrial	494,324,192	6,953,463	46	10,746,178	1.41
28	12 - Large Industrial	122,543,160	1,496,216	2	61,271,580	1.22
29	15 - All-Electric Large					
30	General Service	66,204,787	992,425	73	907,737	1.50
31	18 - Emergency	94,849	7,105	7	13,550	7.49
32	19 - Outdoor Lighting	30,402,263	1,485,368	6,901(d)	4,434	4.85
33						
34	TOTAL COMMERCIAL	3,356,419,437	74,992,406	51,055	65,741	2.23
35						
36						
37						
38						
39						
40						
41						
42						
43						

Schedule 6
Page 2 of 2

ANNUAL REPORT of The Cleveland Electric Illuminating Company Year Ended December 31, 1972

	(a)	(b)	(c)	(d)	(e)	(f)
45	Industrial:					
46						
47	6 - General Commercial s-c	41,351,913	1,404,667	2,902	14,249	3.40
48	7 - General Commercial d-c	13,909	575	1	13,909	4.13
49	8 - Large Commercial s-c	1,373,994,871	29,309,569	2,513	546,755	2.13
50	9 - Large Commercial d-c	1,424,440	38,440	3	474,813	2.70
51	10 - Special Low Load Factor					
52	Comercial	3,093,341	314,700	326(d)	9,489	10.17
53	11 - Industrial	1,615,400,605	23,094,075	154	10,489,614	1.43
54	12 - Large Industrial	3,950,769,440	42,365,466	28	141,098,909	1.07
55	13 - Large Low Load Factor	1,571,768	45,724	2	785,884	2.91
56	15 - All-Electric Large General					
57	Service	96,101,235	1,387,485	49	1,961,250	1.44
58	19 - Outdoor Lighting	9,899,870	469,163	1,162(d)	8,520	4.74
59	Other - Contracts	205,078,910	1,501,192	8	25,634,864	.73
60						
61	TOTAL INDUSTRIAL	7,298,700,302	99,926,056	7,148	1,021,083	1.37
62						
63	TOTAL COMMERCIAL &					
64	INDUSTRIAL	10,655,119,739	174,918,462	58,203	183,068	1.64
65						
66	(444) Public Street & Highway					
67	Lighting					
68						
69	Public Street Lighting	121,635,690	5,722,191	139	875,077	4.70
70	Traffic Control Lighting	13,017,842	328,105	124	104,983	3.06
71						
72	TOTAL	134,653,532	6,050,296	263	511,991	4.49
73						
74	(445) Other Sales to Public					
75	Authorities					
76						
77	Contracts Total	320,625,213	3,908,727	187	1,714,573	1.22
78						
79	(446) Sales to Railroads &					
80	Railways					
81						
82	Cleveland Transit System	31,449,474	492,905	1	31,449,474	1.57
83						
84	(447) Sales for Resale					
85						
86	City of Cleveland					
87	Dept. of Public Utilities	138,082,317	1,973,537	1	138,082,317	1.43
88	Toledo Edison	162,753,000	1,384,313	-		.85
89						
90	TOTAL	300,835,317	3,357,850	1		1.12
91						
92	TOTAL SALES OF ELECTRICITY	15,173,048,362	287,619,028	667,878	22,718	1.90

Source Form 1

Schedule 6
Page 1 of 2

Annual Report of THE CLEVELAND ELECTRIC ILLUMINATING COMPANY Year ended December 31, 1972

SALES FOR RESALE (Account 447)

1. Report sales during year to other electric utilities and to cities or other public authorities for distribution to ultimate consumers.
2. Provide subheadings and classify sales as to (1) Associated Utilities, (2) Nonassociated Utilities, (3) Municipalities, (4) [illegible] and (5) Other Public Authorities. For each sale designate statistical classification in column (b) thus: FP, for firm power supply; IP, for interruptible power supply; DP, for dump power; O, for other. Place an "x" in column (c) if sale involves export across a state line. Group together sales coded "x" in column (c) by state (or country) of origin, providing a subtotal for each state (or country) of delivery in columns (d), (e), and (f), as indicated in column (a).
3. Report separately firm, dump, and other power sold on the same utility. Describe the nature of any sales classified as Other Power, column (b).
4. If delivery is made at a substation indicate ownership in column (f), thus: respondent owned or leased, RS, customer owned or leased, CS.

Line No.	Sales to (a)	Statistical Classification (b)	Export across State lines (c)	F.P.C. Rate Schedule No. (d)	Point of Delivery (e)	Substation (f)	For 60 MINUTE Demand (Specify which) Contract demand (g)	Average monthly maximum demand (h)	Annual maximum demand (i)
1	Nonassociated Utilities								
2									
3	Toledo Edison	FP(P)		9	Various	-	95,000	32,000	98,000
4									
5	Municipalities								
6									
7	City of Cleveland,								
8	Dept. of Public	O		7	Various	-	Various		
9	Utilities, Division			**					
10	of Light & Power							24,000	44,000
11		Temporary emergency sales to City of Cleveland							
12									
13									
14									
15									
16									
17									
18									
19									
20	**kWhr and revenue subsequent to May 30, 1972 FPC Order Setting								
21	Interim Rates.								
22									
23									
24									
25									
26									
27									
28									
29									
30									
31									
32									
33									
34									
35									
36									
37									
38									
39									
40									
41									
42									
43									
44									

412

Form [illegible]

Schedule 7
Page 2 of 2

Annual report of ...THE CLEVELAND ELECTRIC ILLUMINATING COMPANY ... 19 72

SALES FOR RESALE (Account 447) (Continued)

3. If a fixed number of kilowatts of maximum demand is specified in the power contract as a basis of billing to the customer this number should be shown in column (c). The number of kilowatts of maximum demand to be shown in column (h) and (i) should be actual based on monthly readings and should be furnished whether or not used in the determination of demand charges. Show in column (i) type of demand reading (instantaneous, 15, 30, or 60 minutes integrated).

4. The number of kilowatt-hours sold should be the quantity shown by the bills rendered to the purchasers.

5. Explain any amounts entered in column (e) such as fuel or other adjustments.

6. If a contract covers several points of delivery and small amounts of electric energy are delivered at each point, such sales may be grouped.

Type of demand reading (i)	Voltage at which delivered (h)	Kilowatt-hours (f)	REVENUE: Demand Charges (m)	Energy (n)	Other Charges (o)	Total (p)	Revenue per kwh (q)	Line No.
			$	$	$	$	Cents	
60-Min.	345 kV 132 kV	162,753,000	-	689,690	694,623*	1,384,313	.851	3
		56,883,595	69,049	483,510	-	552,559	0.971	8
		81,198,722	-	1,420,978	-	1,420,978	1.750	9
60-Min.	11 kV & 69 kV	138,082,317	69,049	1,904,488	-	1,973,537	1.429	10

*In accordance with Central Area Power Coordination Group (CAPCO) Memorandum of Understanding executed on September 14, 1967, Toledo Edison Company has an entitlement to 95,000 kW capacity of CAPCO #2 (The Illuminating Company Eastlake #5) commencing on September 21, 1972. The Toledo Edison Company shall meet its investment responsibility by making appropriate payments to The Illuminating Company to cover annual fixed charges. The figure in Column (o) is the amount of fixed charges that Toledo Edison Company paid to The Illuminating Company during the year 1972.

BEST COPY AVAILABLE

Schedule 8
Page 1 of 3

INDEX OF FILED ELECTRIC RATE SCHEDULES

RECEIVED
FEDERAL POWER COMMISSION

BUREAU OF POWER
FEDERAL POWER COMMISSION
JUNE 30, 1971

Schedule 8
Page 2 of 3

RATE SCHEDULE FPC NO.	OTHER PARTY	DATE OF INSTRUMENT	TYPE OF SERVICE	EFFECTIVE DATE
	CITIZENS UTILITIES COMPANY (CONTINUED)			
	ARIZONA PR AUTH			
EXH. A		11-18-60	T	
	CLEVELAND ELECTRIC ILLUMINATING COMPANY, THE			
1	OHIO PR CO	12-16-63	C/C	12-01-63
1.1		01-28-69	C/C	09-17-70
2	OHIO EDI CO	08-12-64	C/C	09-14-64
2.1		04-21-67	C/C	05-25-67
3	OHIO EDI CO	04-13-65	C/C	INIT SERV
4	PJM GROUP	11-19-65	O(L)	01-22-66
4.1		05-04-67	FS	06-05-67
6	PA EL CO	07-25-65	R	01-22-66
7	CLEVELAND	01-20-70	F	02-04-70
7.1		03-17-70	O(L)	CON OF FAC
7.2		06-09-70	O(L-C)	06-12-70
7.3		07-22-70	O(L-C)	06-12-70
	COLUMBUS & SOUTHERN OHIO ELECTRIC COMPANY			
6	OHIO VLY EL CORP	01-14-64	C/C	02-16-64
6.1		07-02-65	C/C	08-20-65
6.2		06-28-66	C/C	07-31-66
6.3		01-12-67	C/C	01-16-67
6.4		01-30-67	C/C	03-16-67
6.5		12-18-70	C/C	01-01-71
9	OHIO PWR. CO.	03-26-64	C/C	INIT. SERV.
9.1		11-29-68	C/C	01-01-69
9.2		08-03-70	C/C	10-05-70
9.3		01-29-71	C/C	01-01-71
10	THE DAYTON PR AND LT CO	01-11-63	R-F-X-E-SR-FS	10-01-64
10.2		09-22-67	O(L)	08-05-67
12	OHIO EDI CO	(11-29-57	X-F-E-M	09-13-64
		(07-06-59	-	
		(08-19-59	-	
		(11-01-61	O(L)	
		(04-16-63	O(B-L)	
13	OHIO EDISON CO.	03-23-61	F	08-27-64
14	WESTERVILLE	09-15-64	F	08-24-64
14.1		04-09-69	F	04-01-69
17	OHIO PR CO	08-24-68	C/C	08-27-64
18	COLUMBUS	-	F	01-01-69

Schedule 8
Page 3 of 3

APPENDIX

F - FIRM POWER.
FS - SHORT TERM FIRM POWER.
E - ECONOMY ENERGY.
X - EMERGENCY SERVICE.
D - DUMP ENERGY.
T - TRANSMISSION OR WHEELING SERVICE.
H - HYDRO STORAGE ENERGY.
S - STANDBY SERVICE.
U - UNIT SALE.
V - DIVERSITY EXCHANGE OF CAPACITY.
R - FACILITIES CHARGE (OTHER THAN CHARGES FOR TRANSMISSION
O - OTHER, SPECIFIED AS FOLLOWS.
    (B) METERING AND BILLING
    (L) ADDITIONAL CONNECTIONS, LINES, INTERCHANGE POINTS, DELIVERY POINTS, ETC.
    (C) CHANGE IN CAPACITY
    (T) CHANGE IN TERM
    (W) CONTRACT CANCELLED BUT RATE SCHEDULE STILL IN EFFECT
I - INTERRUPTIBLE POWER.
N - INADVERTENT TRANSMISSION OF POWER.
C/C - CERTIFICATE OF CONCURRENCE.
SR - SPINNING RESERVE.
M - SCHEDULED MAINTENANCE.

APPENDIX H

Example of How Cleveland Properly Raised the Interstate Commerce Issue

Formal Case No. 71-634-Y

Before

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY FOR AUTHORITY TO AMEND AND TO INCREASE ITS FILED SCHEDULES FIXING RATES AND CHARGES FOR ELECTRIC SERVICE

MEMORANDUM BY THE CITY OF CLEVELAND IN SUPPORT OF MOTION TO DISMISS THE INSTANT APPLICATION

I. *Plant And Operations Located And Conducted Outside Of Ohio Are Beyond The Jurisdiction Of The Public Utilities Commission Of Ohio*

Section 4905.05 of the Ohio Revised Code limits the jurisdiction of the Public Utilities Commission of Ohio ". . . to that part of such plant or property which lies within this state . . . and to the records and accounts of the business thereof done within this state." The Supreme Court of the United States in *Public Utilities Commission of Ohio et al. v. United Fuel Gas Co. et al.*, 317 U.S. 456 at page 468 held that ". . . the assertion of power by the Public Utilities Commission of Ohio must be construed in the light of its authority under the Ohio statutes . . ." Both the Company and the Staff of the Public Utilities Commission of Ohio have attributed and included within their respective rate base valuations over $50,000,000

for hydraulic production plant located in Pennsylvania. Depreciation and other costs attributable to said plant have been included within the total cost of service exhibits, studies, and reports of both the staff and the applicant. Cleveland at this point has no way of knowing what other property and related costs have also been incorrectly brought into this case for plant and operations located outside of Ohio in clear defiance of the provisions of Section 4905.05 of the Ohio Revised Code which limits the jurisdiction of this Commission to matters exclusively within the State of Ohio.

II. *Plant And Costs Allocable To Sales That Are The Subject Of Municipal Contracts Are Beyond The Jurisdiction Of The Public Utilities Commission Of Ohio*

No principle of law is more well settled than the one that a contract between a utility and a municipality places the subject matter of said contract beyond the jurisdiction of this Commission. This Commission has recognized that on many occasions. As recently as February 21, 1973, in case no. 71-135-Y this Commission said:

> "Where an Ordinance is passed, be it the first or second Ordinance and accepted by the Utility, it acquires the protective shield of Section 4, Article XVIII, of the Constitution of the State of Ohio, and is not subject to review by this Commission. *Link v. PUCO*, 102 Ohio St. 336; *Akron v. PUCO*, 126 Ohio St. 333; *Phelps v. Logan National Gas and Fuel Co.*, 101 Ohio St. 144; *In the Matter of the Complaint and Appeal of Columbia Gas of Ohio, Inc.*, PUCO Case No. 33617, Dismissal entry dated August 15, 1966."

In *Pfau v. Cincinnati*, 142 Ohio St. 101, the Supreme Court of Ohio in the first two syllabi held:

"1. Under the provisions of Section 4, Article XVIII, of the Constitution of Ohio any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service.

2. These provisions are self-executing, and the powers therein enumerated are not subject to restriction by the General Assembly. (Paragraph 3 of the syllabus in the case of Board of Education of City School District of Columbus v. City of Columbus, 118 Ohio St. 295, approved and followed.)"

In this case both the staff and the applicant have included over $10,000,000 in street lighting and signal system distribution plant and the attendant costs within their exhibits, filings, and reports which both were and will be for many years the subject of Ordinance contracts between the applicant and the affected municipalities (See Exhibit "A"). Associated with said street lighting and signal System Distribution plant are many millions of dollars in production, transmission, and other distribution plant that serve street lighting and signal system sales. Said production, transmission, and distribution plant remain unidentified within the great mass account valuations submitted by both the staff and the applicant.

There are other contracts such as the one with the Cleveland Transit System that may also require that proper allocations be made.

III. *This Commission Does Not Have The Power To Regulate Plant and Costs Which Are The Subject Of Interstate Wholesale Operations. Allocations Must Be Made Between Interstate Wholesale And Intrastate Distribution Operations*

The two leading cases dealing with the necessity for allocations are *The Minnesota Rate Cases*, 230 U.S. 352 (1912), and *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133 (1930). In the *Minnesota Rate Cases, supra*, the United States Supreme at page 435 said:

"Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the Smyth Case (id., p. 541). The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, *on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.* (Emphasis added)

In the present cases, the necessity of this segregation of the domestic business in determining values and results of operation, was recognized by both parties . . ."

The Court at page 461 also held that:

"When rates are in controversy, it would seem necessary to find a basis for division of the total value of the property, independent of revenue, and this must

be found in the use that is made of the property. That is, there should be assigned to each business, that proportion of the total value of the property which will correspond to the extent of its employment in that business . . ."

In *Smith v. Illinois Bell Telephone Company, supra,* a case also involving an allocation between intrastate and interstate business, the United States Supreme Court at page 148, said regarding allocations:

". . . It is essential to the appropriate recognition of the comparable government authority in each field of regulations. . ."

In the landmark case of *Missouri v. Kansas Gas Co.,* 265 U.S. 298 (1923), the Supreme Court of the United States held that the business of piping natural gas from one state to another and selling it, not to consumers, but to independent distributing companies which sell it locally to the consumers, is interstate commerce which cannot be the subject of rate regulation. The Court at pages 307-308 said:

"The line of division between cases where, in the absence of congressional action, the State is authorized to act, *and those where state action is precluded by mere force of the commerce clause of the Constitution,* is not always clearly marked. In the absence of congressional legislation, a State may constitutionally impose taxes, enact inspection laws, quarantine laws and generally, laws of internal police, although they may have an incidental effect upon interstate commerce. *Pennsylvania R. R. Co. v. Hughes,* 191 U.S. 477, 488-491. But the commerce clause of the Constitution of its own force restrains the States from imposing direct burdens upon interstate commerce. In *Minnesota Rate*

Cases, 230 U.S. 352, 396, Mr. Justice Hughes, speaking for the Court, said: *'If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation.* The point of such an objection is not that Congress has acted, but the State has directly restrained that which in the absence of Federal regulation should be free.' The question is so fully discussed in that case, that nothing beyond its citation is required.

". . . But the sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become part of the general mass of property therein. . ." (Emphasis added)

The case of *Public Utilities Commission of Rhode Island et al. v. Attleboro Steam Electric Company,* 273 U.S. 83 (1926) dealt with essentially the same problem: the attempt by one state to regulate the interstate rates for the sale of electricity from one wholesaler to another wholesaler. Only three percent of the electricity manufactured by the seller was involved with interstate commerce but yet the Supreme Court of the United States found at pages 89-90 that:

"It is immaterial that the Narragansett Company is a Rhode Island Corporation subject to regulation by the Commission in its local business, or that Rhode Island

is the state from which the electric current is transmitted in interstate commerce, and not that in which it is received, as in the Kansas Gas Co. case. *The forwarding state obviously has no more authority than the receiving State to place a direct burden upon interstate commerce. Pennsylvania v. West Virginia*, 262 U.S. 553, 596. *Nor is it material that the general business* of the Narragansett Company *appears to be chiefly local*, while in the Kansas Gas Co. case the Company was principally engaged in interstate business. *The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character;* and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the State because this may be the smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Co. because this would result in indirect benefit to the customer of the Narragansett Co. in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates of such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Co. in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required, it can only be attained by the exercise of the power vested in Congress. See

Covington Bridge Co. v. Kentucky, 154 U.S. 204, 220; *Hanley v. Kansas City S. Ry. Co.*, 187 U.S. 617, 620." (Emphasis added)

During the test year of 1971 the applicant delivered 350,153,000 K.W.H. and received 201,517,000 K.W.H. from the "Pennsylvania-New Jersey-Maryland Group" as shown on page 424 of the applicant's Annual Report to the Federal Power Commission (Exhibit "B"). This interstate commerce according to the *Attleboro Case* is clearly outside the jurisdiction of the Public Utilities Commission of Ohio.

Sales and interchange of power to other wholesalers located in Ohio are also undoubtedly beyond the jurisdiction of this Commission. For instance the Federal Power Commission asserted jurisdiction over the applicant's wholesale sales to Cleveland's Division of Light & Power in Federal Power Commission Dockets E-7631, E-7633, and E-7713.

The power that is sold by CEI to other Ohio utilities either directly for money or for return in kind as interchange power goes in large part through displacement to still other utilities located outside of Ohio. The facts relative to the interstate nature of operations by the Ohio Power Company (1971 Sales and Trades with CEI are Shown in Exhibit "B") are shown on pages 25-31 of the "Secretary's Report of Investigation" in Public Utilities Commission of Ohio Case No. 71-283-Y. This Commission can certainly take administrative notice of how CEI through the CAPCO Group is connected with all of the other major electric utilities in the United States and that through its own transmission lines and those of the CAPCO Group the applicant at wholesale buys, sells, and trades electric energy (both directly and through displacement) with major electric utilities outside of Ohio to the very continental borders of this nation.

A recent case which summarizes the law relative to a state commission's lack of jurisdiction over these wholesale sales is *Arkansas Power & Light Company v. Federal Power Commission,* 368 Fed. 2d 376, where the United States Court of Appeals for the Eighth Circuit said at pages 383-384:

"Petitioner also raises other subsidiary issues, resolution of which is not difficult. The first relates to its contention that the state of Arkansas can constitutionally regulate the intrastate wholesale sales to its twenty-three customers, if in fact there is more than enough generation by petitioner within Arkansas to cover such sales. In view of our affirmation of the Commission's findings that each of petitioner's sales to its twenty-three customers involves interstate energy, we find petitioner's contention well settled by *Public Utilities Commission v. Attleboro Steam & Electric Company,* 273 U.S. 83, 47 S. Ct. 294, 71 L. Ed. 549 (1927), which held that state regulation of sales in interstate commerce constituted a direct burden on interstate commerce. *Federal regulation of sales for resale under Section 201 of the Federal Power Act thus precludes concurrent state jurisdiction. United States v. Public Utilities Commission, supra.* Moreover, the fact that the volume of interstate energy passing over Arkansas' transmission lines may at times be small in comparison with its intrastate generated energy is a factor which Congress has left to the discretion of the Commission in determining whether to exercise its jurisdiction. The courts will not construct a jurisdictional limitation on the amount of interstate energy involved. *Connecticut Light & Power Co. v. Federal Power Commission, supra.*" (Emphasis added)

As previously shown on page 6 of Cleveland's protest to the staff report in the instant case the total value of this plant allocable to interstate wholesale sales and trades of electric energy is about $125,000,000.

If the Commission allows the plant and costs of these wholesale sales and trades to be included in this case, it will in effect be regulating this interstate commerce. If for instance the applicant earns too high a return from its sales to the Cleveland Municipal Electric Light Plant under Ohio standards, the excess profit would be used as an offset to additional increases to which the applicant would otherwise be entitled in its intrastate rates. By like token if the applicant earns too low a return from its sales to the Cleveland Municipal Electric Light Plant under Ohio standards, the deficit would be offset through greater increases than would otherwise be lawful in its intrastate rates.

CONCLUSION

The applicant and the staff have brought to this Commission valuations and total cost of service reports, filings, and exhibits which reflect matters that are outside this Commission's scope of review. The inclusion of these non-jurisdictional matters turn an already difficult case into one that is totally unmanageable by making it impossible for the Commission to arrive at a relevant decision regarding the rates in question, or for the City of Cleveland to come to grips with the relevant plant and costs.

Respectfully submitted,

/s/ ROBERT D. HART

First Assistant Director of Law

STATUS OF STREET LIGHTING CONTRACTS

Municipality	Was There a Contract: On Date Certain	Was There a Contract: After Date Certain	Date Current Contract will Expire
Aquilla	Yes	Yes	7/1/79
Ashtabula City	Yes	Yes	6/1/79
Ashtabula Co.	Yes	Yes	12/1/79
Ashtabula Twp.	Yes	Yes	3/1/77
Asht. Twp. Fx.	Yes	Yes	5/1/79
Auburn	Yes	Yes	7/1/78
Austinburg	Yes	Yes	9/1/78
Avon	Yes	Yes	9/1/78
Avon Lake	Yes	Yes	3/1/77
Bainbridge	Yes	Yes	6/1/76
Bay Village	Yes	Yes	11/1/76
Beachwood	Yes	Yes	4/1/76
Bedford	Yes	Yes	4/1/77
Bedford Hts.	Yes	Yes	6/1/78
Bentlyville	Yes	Yes	2/1/77
Berea	Yes	Yes	11/1/76
Bratenahl	Yes	Yes	5/1/78
Brecksville	Yes	Yes	3/1/79
Broadview Hts.	Yes	Yes	4/1/76
Brooklyn	Yes	Yes	11/1/77
Brooklyn Hts.	Yes	Yes	11/1/76
brook Park	Yes	Yes	7/1/78
Burton Twp.	Yes	Yes	6/1/79
Burton Vil.	Yes	Yes	4/1/76
Chagrin Falls V.	Yes	Yes	6/1/77
Chagrin Falls T.	Yes	Yes	2/1/79
Chardon	Yes	Yes	6/1/79
Chester	Yes	Yes	8/1/76
Claridon	Yes	Yes	7/1/76
Cleveland	Yes	Yes	No Contract
Cleveland Hts.	Yes	Yes	7/1/77
Colebrook	Yes	Yes	7/1/78
Concord	Yes	Yes	3/1/79
Conneaut	Yes	Yes	8/1/76
Cuyahoga Hts.	Yes	Yes	9/1/79
Cuyahoga Co.	Yes	Yes	1/1/76
Denmark	Yes	Yes	6/1/75
East Cleveland	Yes	Yes	1/1/78
Eastlake	Yes	Yes	8/1/77
Euclid	Yes	Yes	6/1/78
Fairport	Yes	Yes	7/1/80
Fairview Park	Yes	Yes	2/1/77
Garfield Hts.	Yes	Yes	10/1/77
Gates Mills	Yes	Yes	6/1/76
Geneva City	Yes	Yes	5/1/78
Geneva-on-Lake	Yes	Yes	10/1/76
Geneva Twp.	Yes	Yes	2/1/79
Glenwillow	Yes	Yes	7/1/77

Municipality	Was There a Contract On Date Certain	Was There a Contract After Date Certain	Date Current Contract will Expire
Grand River	Yes	Yes	12/1/80
Hambden	Yes	Yes	7/1/76
Harperafield	Yes	Yes	8/1/80
Hartsgrove	Yes	Yes	2/1/77
Highland Hts.	Yes	Yes	11/1/76
Huntsburg	Yes	Yes	10/1/79
Independence	Yes	Yes	1/1/80
Jefferson Twp.	Yes	Yes	7/1/77
Jefferson Vil.	Yes	Yes	2/1/78
Kingsville	Yes	Yes	2/1/78
Kirtland	Yes	Yes	9/1/76
Lakeline	Yes	Yes	2/1/77
Lakewood	Yes	Yes	10/1/77
Leroy	Yes	Yes	9/1/77
Linndale	Yes	Yes	8/1/78
Lyndhurst	Yes	Yes	1/1/78
Madison Twp.	Yes	Yes	3/1/79
Madison Vil.	Yes	Yes	5/1/73
Maple Hts.	Yes	Yes	9/1/77
Mayfield	Yes	Yes	8/1/76
Mayfield Hts.	Yes	Yes	11/1/79
Mentor City	Yes	Yes	8/1/75
Mentor-on-Lake	Yes	Yes	7/1/76
Middleburg Hts.	Yes	Yes	3/1/77
Middlefield	Yes	Yes	7/1/76
Monroe	Yes	Yes	8/1/76
Montville	Yes	Yes	3/1/76
Moreland Hills	Yes	Yes	11/1/76
Munson	Yes	Yes	11/1/78
Newburgh Hts.	Yes	Yes	10/1/79
Newbury	Yes	Yes	10/1/80
New Lyme	Yes	Yes	8/1/80
North Kingsville	Yes	Yes	4/1/77
North Olmsted	Yes	Yes	1/1/78
North Perry	Yes	Yes	7/1/77
North Randall	Yes	Yes	9/1/78
North Royalton	Yes	Yes	9/1/79
Oakwood	Yes	Yes	2/1/80
Ohio Dept. Hwys.	Yes	Yes	11/1/74
Olmsted Twp.	Yes	Yes	6/1/77
Olmsted Falls	Yes	Yes	1/1/75
Orange	Yes	Yes	4/1/79
Orwell Twp.	Yes	Yes	12/1/77
Orwell Vil.	Yes	Yes	8/1/80
Painesville Twp.	Yes	Yes	6/1/77
Painesville Park	Yes	Yes	5/1/76
Parma	Yes	Yes	10/1/77
Parma Hts.	Yes	Yes	5/1/77
Pepper Pike	Yes	Yes	10/1/79
Perry Twp.	Yes	Yes	12/1/79
Perry Vil.	Yes	Yes	5/1/78
Pierpont	Yes	Yes	12/1/77
Plymouth	Yes	Yes	2/1/79

Municipality	Was There a Contract On Date Certain	Was There a Contract After Date Certain	Date Current Contract will Expire
Richmond Hts.	Yes	Yes	8/1/78
Rock Creek	Yes	Yes	10/1/80
Rome	Yes	Yes	10/1/80
Rocky River	Yes	Yes	5/1/77
Russell	Yes	Yes	4/1/80
Saybrook	Yes	Yes	6/1/80
Seven Hills	Yes	Yes	8/1/78
Shaker Hts.	Yes	Yes	5/1/78
Solon	Yes	Yes	6/1/77
South Euclid	Yes	Yes	3/1/77
South Russell	Yes	Yes	4/1/78
Strongsville	Yes	Yes	1/1/77
Thompson	Yes	Yes	11/1/77
Timberlake	Yes	Yes	6/1/76
Troy	Yes	Yes	9/1/77
Trumbull	Yes	Yes	5/1/77
University Hts.	Yes	Yes	4/1/77
Valley View	Yes	Yes	6/1/77
Walton Hills	Yes	Yes	3/1/77
Warrensville Hts	Yes	Yes	5/1/77
Warrensville Twp	Yes	Yes	11/1/80
Westlake	Yes	Yes	1/1/77
Wickliffe	Yes	Yes	3/1/76
Willoughby	Yes	Yes	8/1/76
Willoughby Hills	Yes	Yes	8/1/77
Willowick	Yes	Yes	2/1/77
Windsor	Yes	Yes	2/1/78
Woodmere	Yes	Yes	10/1/80

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INTERCHANGE POWER (Included in Account 555)

1. Report below all of the kilowatt-hours received and delivered during the year. For receipts and deliveries under interchange power agreements, show the net charge or credit resulting therefrom.

2. Provide subheadings and classify interchanges as to (1) Associated Utilities, (2) Nonassociated Utilities, (3) Associated Nonutilities, (4) Other Nonutilities, (5) Municipalities, (6) Cooperatives, and (7) Other Public Authorities. For each interchange across a state line place an "X" in column (b).

3. Particulars of settlements for interchange power shall be furnished in a footnote or supplemental schedule which includes the name of each company, the nature of the transaction, and the dollar amounts involved. If settlement for any transaction also includes credit or debit amounts other than for increment generation expenses, show such other component amounts separately, in addition to debit or credit for increment generation expenses, and give a brief explanation of the factors and principles under which such other component amounts were determined. If such settlement represents the net of debits and credits under an interconnection, power pooling, coordination, or other such arrangement, submit a copy of the annual summary of transactions and billings among the parties to the agreement. If the amount of settlement reported in this schedule for any transaction does not represent all of the charges and credits covered by the agreement, furnish in a footnote a description of the other debits and credits and state the amounts and accounts in which such other amounts are included for the year.

Summary of Interchange According to Companies and Points of Interchange

Line No.	Name of company (a)	Interchanges across State lines (b)	FPC Rate Schedule Number (c)	Point of Interconnection (d)	(kV) Voltage at which interchanged (e)	KILOWATT-HOURS (b) Received (f)	Delivered (g)	Net difference (h)	(b) Amount of settlement (i)
1	Nonassociated Utilities								
2	Ohio Edison Company			Summit County Line, Ohio,					
3				Sheffield Twp., Ohio, and					
4			2	Richfield Twp., Ohio	132 and 345	428,917,000	499,849,000	(70,932,000)	1,297,235
5	Ohio Power Company		1	Canaburg Twp., Ohio	345	135,177,000	68,567,000	66,610,000	649,885
6	Pennsylvania-New Jersey-								
7	Maryland Group	X	4	Ohio-Pa. State Line	345	201,517,000	350,153,000	(148,636,000)	820,047
8	(a) See Note (a) on Page 422.								
9	Other Nonutilities								
10	Union Carbide Corporation	-	-	Ashtabula Twp., Ohio	13.8	23,830,000	19,665,000	4,165,000	18,743
11									
12									
13									
14	(b) See Page 424a.								
15									
16									
17									
18									
19									
20									
21									
22									
23									

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Supreme Court of the United States

October Term, 1975
No. 75-447

THE CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI

Respondent, The Cleveland Electric Illuminating Company, urges the Court to deny Petitioner's prayer for a Writ of Certiorari to review the judgment of the Supreme Court of Ohio on the ground that there is no Federal question involved in this proceeding.

THE QUESTION PRESENTED

Where a state regulatory body fixes the rates for the sale by a public utility of electric energy to consumers within the state in accordance with applicable state law, is such action unlawful under the Commerce Clause of the United States Constitution because in making its calculations it failed to segregate a small amount of interstate business where such interstate business and the rates for such interstate business are wholly unaffected by such determination.

STATEMENT OF THE CASE

Electric utility rates in the State of Ohio are regulated by the Public Utilities Commission of Ohio subject to appeal to the Supreme Court of Ohio. Such regulation does not extend to sales for resale since the statute defining which electric companies are subject to commission jurisdiction restricts the application to companies when in the business of sales to consumers within the state. Ohio Rev. Code §4905.03(A)(4). This Respondent is interconnected with electric utilities in other states and its wholesale rates within the State of Ohio as well as its rates for direct interstate sales are subject to the regulatory jurisdiction of the Federal Power Commission. 16 U.S.C. Sec. 824(a). The proceeding which is the subject of this Petition, was an application by this Respondent for an increase in all of its rates subject to the jurisdiction of the Public Utilities Commission of Ohio. Such application was granted in substantial part by the Commission in the Opinion and Order reprinted as Appendix A, page

11, of the Petition. After reversal in part on a separate appeal by this Respondent, the balance of Respondent's application was granted in an Opinion and Order reprinted as Appendix D, page 102, of the Petition.

Petitioner, the City of Cleveland, operates an electric plant and distribution system which is in direct retail competition with this Respondent in a portion of the City of Cleveland. In addition, Petitioner purports to represent the citizens of the City of Cleveland in opposition to Respondent's application for an increase in rates. For reasons which are not apparent to this Respondent, Petitioner has from the beginning objected to the failure of this Respondent in making its case and the failure of the Public Utilities Commission of Ohio in deciding the case, to make allocations so as to separate the property, revenues and expenses assignable to street lighting and to certain of this Respondent's transactions which are subject to the regulatory jurisdiction of the Federal Power Commission. The Respondent, Public Utilities Commission of Ohio, did not in this case regulate or attempt to regulate interstate sales or sales otherwise subject to the jurisdiction of the Federal Power Commission. No action taken by the Public Utilities Commission in this proceeding regulates, purports to regulate, or affects the rates and charges for electric energy which are subject to, and regulated by, the Federal Power Commission.

The tabulation set out on page 6 of the Petition, showing that approximately 6% of this Respondent's deliveries of electric energy are made pursuant to Federal Power Commission rate schedules, is misleading. The only sale for resale in the true sense of the word, is the sale to Petitioner for its municipal electric light plant under an emergency rate schedule properly characterized by the

Public Utilities Commission of Ohio engineering staff as a "temporary arrangement with the City of Cleveland" (Appendix A, p. 9) and shown on line 20, page 122 of the Petition, Appendix G. The other deliveries of electric energy to other utilities shown in the tabulation of page 6 is from page 120 of Petitioner's Appendix F. As appears, however, by page 123 of the same Appendix, these deliveries were almost exactly balanced by the receipts from the same group of companies to which the deliveries were made. For this reason, the Commission staff (and the respondent Commission) determined that these transactions did not affect the amount of production facilities required for the Company's intrastate customers, and that engaging in the transactions was "somewhat profitable to the ultimate customers" and that an allocation was unnecessary (Appendix B, page 11).

REASONS WHY THE WRIT SHOULD BE DENIED

No Federal Question Is Involved in This Proceeding

Respondent, the Public Utilities Commission of Ohio, has not attempted to regulate interstate rates or to make any determination relative to the portion of the Company's electric business which is subject to the jurisdiction of the Federal Power Commission other than to determine that the financial effect thereof was so inconsequential that it could be ignored (Pet., p. 91, Appendix C). It is difficult to see how any action by the Commission could burden interstate commerce since it does not, and does not purport, to regulate it, to require interstate business to subsidize intrastate business, to fix any rates at which

interstate commerce is carried on or to interfere in any way with any action which the Federal Power Commission might take in respect of such interstate transactions. Indeed, as we read Petitioner's brief, Petitioner does not really claim that the Commission order complained of does any of these things. Rather the claim seems to be that since this Court has held that an allocation is necessary to test the question whether rates imposed by a state are confiscatory, such an allocation is a constitutional requirement in any case whether or not any burden on interstate commerce is involved.

At most, the only theoretical effects of ignoring the interstate transactions would be to inflate the rate base or reduce the indicated profit, or both. But the only effect of either would be to increase the indicated level of rates for the intrastate business subject to the Ohio Commission jurisdiction, a matter with respect to which Petitioner might possibly have a claim under state law but which has been decided against Petitioner in the tribunals below and which certainly does not involve any Federal question.

The passage in the *Minnesota Rate Cases*, 230 U.S. 352 (1912), to which Petitioner refers at pages 4 and 5 of its petition, is to the point that the public utility may not justify unreasonably high rates on domestic business in order to meet losses on its interstate business. The Court held that an allocation to determine the proportion of railroad property utilized in the interstate business was essential because the question before the court (p. 433) was whether the state had overstepped the Constitutional limits by making the intrastate rates so unreasonably low that the carriers were deprived of their property without due process of law and denied the equal protection of

the law. This Court held that the interstate property and revenues and expenses must be allocated out before it could be ascertained whether the state rates were unconstitutionally low. This is, of course, an entirely different question than that presented by Petitioner here that a finding by the Commission that a utility's rate is fair and reasonable is tainted with illegality under the Commerce Clause of the United States Constitution because of a failure to segregate interstate business held by the Commission to be irrelevant where no claim of confiscation by the State is involved and there is no attempt to regulate or burden the interstate business.

The quotation from page 461 of the *Minnesota Rate Cases* is not a statement by the Court that an allocation is always necessary when rates are in controversy, but was made in the process of a holding that, where an allocation is made and where rates themselves are in issue, an allocation based on revenue is not a proper one because of the circularity involved.

The decision in the *Minnesota Rate Cases* itself supports our position. In one of the cases there involved (The Minneapolis and St. Louis Railway) although the allocation between interstate and intrastate commerce was held by the Court to have been erroneously made, the Court nevertheless affirmed that case because the margin of error introduced thereby was not so great as to affect the result. (p. 472).

In *Smith v. Illinois Bell Telephone Company,* 282 U.S. 133 (1930), the district court had enjoined rates fixed by the State of Illinois for telephone service in Chicago on the ground that the rate of return allowed was so low as to be confiscatory of the utility's property. It had, however, tested the adequacy of the reduced rates on

the basis of the total Chicago property without making an attempt to segregate the portion of such property devoted to interstate service. The Supreme Court held in effect that a determination of the confiscation of the utility's property could not be made unless the effect of the rates were tested against property devoted only to intrastate service. The case is not in point.

The other case cited by Petitioner is *Public Utilities Commission of Rhode Island v. Attleboro,* 273 U.S. 83 (1927), as to which it states that this Court "required allocations" when less than 3% of the company's deliveries were interstate to another utility. This is not correct. In *Attleboro* a Rhode Island utility had a contract for the sale of electric energy in interstate commerce to a company which distributed electric energy in Attleboro, Massachusetts, which contract had been originally approved by the Rhode Island Commission. Upon petition of the Rhode Island company, the Rhode Island Commission allowed an increase of these rates over the opposition of the Attleboro company. This court held that this being an interstate sale, it was not subject to regulation by the State of Rhode Island.

In short, the only sale for resale, that to Petitioner itself, was under the undisputed testimony *de minimis* in character (Appendix C, p. 13) and the other interstate transactions were substantially balanced by transactions in and out and did not have any material effect on the company's facilities.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpt From Staff Report of Investigation

The Cleveland Elec. Illum. Co.

Case No. 71-634-Y

The following table gives the magnitude of the mechanical and "other" forms of depreciation:

Item	Mechanical Depreciation	"Other" Forms of Depreciation	Total
Transmission Accounts	15.6	3.0	18.6
Distribution Accounts	16.5	3.0	20.1
General Plant Accounts	23.2	5.3	20.5

ALLOCATIONS

This proceeding involves all types of sales except those for street lighting and to other utilities. An allocation, less detailed but with sufficient accuracy to form a judgement, indicated no measureable effect on the rate of return by going to an extended allocation. For this reason and because street lighting is less than 1% of the total sales and because it is for the benefit of all customers, no formal allocation was made for this case.

Sales to other utilities are nil except for a temporary arrangement with the City of Cleveland.

Reserve Production Capacity

The system reserve capacity for the year 1970-71 and as anticipated for 1972 is as follows:

Year	Peak Load Year MW	Maximum Capacity MW	System Operating Reserve MW	System Operating Reserve % of load
1970	2517	2900	383	15.2
1971	2750	3205	455	16.5
1972	2805*	3205 + 165**	565	20.1

* Preliminary data

** Contract

These reserves are considered adequate but not excessive.

Land and Land Rights

The engineer's method of calculation of the contribution of Land and Land rights to the rate base differed substantially from that proposed by the company. The result of the different methods in the allocated rate base valuation is as follows:

Applicants' Value	$63,024,000
Engineers' Value	$37,836,000
Difference	$25,188,000

In determining their values the engineers referred to 4909.05 paragraphs A, B & C of the Ohio Revised Code and applied the following principles of those paragraphs:

1) Land refers to land held in fee to the exclusion of land rights leased, rented or purchased.

APPENDIX B

Excerpt From Testimony of Commission Witness Gill

Q. Are you trying to make a distinction between a barter of power, where you trade power for power at one time and a sale for money at another?

A. Yes. I think maybe that is generally true. Oftentimes interchange of power is settled for money and sometimes it is paid back in kilowatt hours. The idea being while this happened to us this year it can happen to somebody else next year.

Q. Well, whether you call it a sale or a barter, the Company certainly seems to contend, in its Annual Report, that this had an impact upon its profitability in the year 1971; correct?

A. Well, the Company no doubt has a reason for saying what they did here. As you know, I am concerned with the rate base and when I first got on the stand I explained our position as far as interchange of power and sales to other utilities was concerned. As long as these sales did not result in an amount of production facility or other facilities that were not required to service the utility's ultimate customer, then it was perfectly proper, and in our opinion—not only that, but somewhat profitable to the ultimate customers, in that if you could make sales with the somewhat underpowered production plant, and the facilities that you have that are needed for the ultimate customer, if you can make sales out of that equipment and the profits of such sales, whatever they are, or losses go to the ultimate customer, then the amount of production facilities is reasonable. But, if the amount of production facilities, for instance, is not reasonable, then

you judge that sale to other utilities was a major business of the Company. But, in this case it seemed like it—while it happened that they were forced to rely on other means or other older equipment, they were still able to do it.

So, as long as the production facilities are a reasonable amount for the ultimate customer, I don't see how we can make any correction in the rate base. And we didn't, for that reason.

Now, if sales to other utilities is a big business and they have to provide production equipment, other production equipment to handle it, that might be a different story.

I believe we analyzed this in the opening remarks, production facilities being reasonable for the ultimate customers. The fact that they were able to take care of, with this facility, without any extra facilities, seems to fall in line with whether or not we think sales to other utilities are unreasonable.

Now, you are bringing out that—they didn't—

APPENDIX C

Excerpt From Testimony of Company Witness Loshing

A. Technically, no. At one point in one of these emergencies we connected that line up to your station Buss at your 53rd Street plant. You had to separate and isolate your Buss. So that, in effect, it was nothing more than a load transfer, it was a reverse power. It was not a free-flowing, synchronized connection. We used it as a means of more of a load transfer.

Q. Fine. Then, do you also, from time to time, both in the test year period and subsequently, sell power to the Municipal Electric Light substations located at various points within the City of Cleveland?

A. Yes, these are the five and six transfer points that I alluded to in the previous answer.

Q. Now, Mr. Loshing, can you tell us whether there is in your Company's case a separation made of the plant that has been servicing in part the Cleveland Municipal Electric Light Plant?

A. In this case? You mean this case?

Q. Yes, this instant case, 71-634-Y.

A. No, we have not made such a separation. We concur in the Staff's position that this was de minimis and inconsequential.

Q. Now, directing your attention to Page 18 of the Staff Report.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Respondent, Public Utilities Commission of Ohio, by its Counsel William J. Brown, Attorney General of Ohio, opposes the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of Ohio in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 330 N.E. 2d 1 (1975), affirming, in part, an Order of the Public Utilities Commission of Ohio.

STATEMENT OF THE CASE

On October 7, 1971, the Cleveland Electric Illuminating Company (hereinafter referred to as "CEI"), a company engaged in the generation and sale of electricity to consumers in nine counties of the State of Ohio, filed an application with the Public Utilities Commission of

Petitioner argues that the decision of the Supreme Court of Ohio conflicts with this Court's holdings in *The Minnesota Rate Cases*, 230 U.S. 352, 33 S. Ct. 729, 57 L. Ed. 1511 (1912) and *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133, 51 S. Ct. 65, 75 L. Ed. 255 (1930).

Two separate and distinct issues were discussed by this Court in *The Minnesota Rate Cases*. The first was whether the intrastate rates established by Minnesota imposed a direct or substantial burden upon interstate commerce or conflcited with any federal law regulating interstate commerce. The second was whether the intrastate rates established by Minnesota were so unreasonably low that the railroads were deprived of their property without due process of law and denied equal protection of the laws.

It is unclear which of these issues is being raised by the Petitioner, since it relies upon the Commerce Clause but quotes a portion of *The Minnesota Rate Cases* which is concerned with the confiscatory nature of the rates. For this reason, each issue will be addressed by this brief.

First, the decision of the Supreme Court of Ohio does not impose any direct or substantial burden upon interstate commerce nor is it in conflict with any federal law regulating interstate commerce. Neither the Commission nor the Supreme Court of Ohio attempted to fix rates for the *interstate* sale of electricity; therefore, Petitioner's reliance upon *Pub. Util. Comm'n of Rhode Island v. Attleboro Steam and Elec. Co.*, 273 U.S. 83, 47 S. Ct. 294, 71 L. Ed. 549 (1927) is misplaced since this Court specifically held that a state may not fix rates for the *interstate* sale of electricity. Petitioner implies, without ever specifically mentioning the federal statute upon which it is relying, that the decision of the Supreme

Court of Ohio conflicts, in some way, with the regulatory jurisdiction of the Federal Power Commission over interstate commerce. Respondent Commission respectfully submits that this is a fallacious argument. Neither the Commission nor the Supreme Court of Ohio attempted to fix rates for the interstate sale of electricity nor did they adjust intrastate rates to take into account an unreasonably low or high rate fixed by the Federal Power Commission for the interestate sale of electricity.

Secondly, the Petitioner quotes extensively from a portion of *The Minnesota Rate Cases* which discussed the test to be applied when determining whether rates are confiscatory, even though Petitioner does not allege that the rates fixed for CEI are confiscatory. The Court held that the "fair value" of the railroad's property must be calculated, after separating the intrastate property from interstate property, because the state could not justify unreasonably high or low intrastate rates based upon the level of interstate rates. Assuming that the test is still applied by this Court, the decision of the Supreme Court of Ohio and of the Commission is in accord with the test insofar as it applies to the allocation of interstate and intrastate property. Both the Supreme Court of Ohio and the Commission recognize the importance of separating such property when fixing rates. However, in this case both the Supreme Court of Ohio and the Commission found that such a separation was not needed since it would have no measurable affect upon the rate of return.

Even if the Supreme Court of Ohio and the Commission have not complied with the holdings of this Court in *The Minnesota Rate Cases*, this Court should not review this case because *The Minnesota Rate Cases* are no longer applicable. Late in the 19th Century, this Court

began reviewing railroad rates fixed by various states. *The Minnesota Rate Cases* were early progenitors of the most recent cases which are concerned with the contitutionality of public utility rates. This Court at different times has ennunciated different tests to be applied when judging the constitutionality of public utility rates. The more recent decisions of this Court indicate that this Court will review only the "total effect" of a rate order and not the method employed to reach the end result. In *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 251, 88 L. Ed. 333 (1944) this Court stated that:

> "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the [Natural Gas] act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Id.* at 320 U.S. 602.

Respondent Commission respectfully suggests that the decision of the Supreme Court of Ohio is in accord with the applicable decisions of this Court.

CONCLUSION

Respondent Commission opposes the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of Ohio in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 330 N.E. 2d (1975) and respectfully urges this Court to deny the Petition.

Respectfully submitted,

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QUESTION PRESENTED

The Cleveland Electric Illuminating Company at page 2 of its Brief states a question of law that is entirely foreign to that presented by the Petitioner. The Company proceeds to destroy its own question of law and to supposedly thereby answer the question of law presented by the City of Cleveland. This is commonly known as building a straw man and then blowing it down.

Counsel for the Public Utilities Commission of Ohio at page 3 of their Brief argue that "Petitioner is asking this Court to review an evidentiary matter which does not involve any substantial Federal question." That is not so.

The City of Cleveland's question of law as stated at page 3 of its Petition for Writ of Certiorari is:

> "Does a state regulatory body have the power to set the profit which a public utility may earn on its sales and trades of electric energy that are in interstate commerce?"

The Cleveland Electric Illuminating Company (CEI) at page 2 of its Brief admits that the powers of the Public Utilities Commission of Ohio do ". . . not extend to sales for resale since the statute defining which electric companies are subject to commission jurisdiction restricts the application to companies when in the business of sales to consumers within the state . . . This Respondent is interconnected with electric utilities in other states and its *wholesale rates within the state of Ohio as well as its rates for direct interstate sales are subject to the regulatory jurisdiction* of the Federal Power Commission. 16 U.S.C. Sec. 824(a)." (emphasis added).

It is axiomatic that if the Public Utilities Commission of Ohio lacks the power to set the rates for CEI's sales to other electric utilities, that the Commission would also be without authority to determine the profit which CEI could earn on such sales. It is likewise axiomatic that if the Commission includes plant in the rate base which services sales outside of its jurisdiction, that the Commission will thereby set a profit which the Company can earn on such sales. It is for those reasons that the Supreme Court of the United States in *The Minnesota Rate Cases,* 230 U.S. 352 (1912), and *Smith v. Illinois Bell Telephone Company,* 282 U.S. 133 (1930) held that in a utility rate case it is necessary to separate that segment of business which is subject to Federal authority from that which properly falls under state control.

The essence of Petitioner's case is that such allocations are jurisdictional and that the Commission erred by failing

to make them. The Respondents have failed to attack the legal necessity for such allocations. The Respondents have instead tried to show that the volume of CEI's sales that fall outside of the Commission's jurisdiction was too small to have had any impact upon the amount of the rate increase granted by the Commission. It is the Respondents and not the Petitioner, which ask this Court to weigh the evidence and to thereby determine the magnitude of the Commission's error in failing to make the necessary allocations.

The City of Cleveland at pages 6-7 of its Petition listed the Company's test year sales and trades of electric energy with other electric utilities in order to establish the fact that the Company had commerce that fell outside of the Commission's jurisdiction. In so doing, the City established the basis in fact for the question of law presented on page 3 of its Petition.

THE COMMERCE SUBJECT TO FEDERAL AUTHORITY WAS VERY SUBSTANTIAL

Cleveland at pages 6-7 of its Petition stated that about six percent of CEI's total deliveries of electricity during the test year were sales to other electric utilities made pursuant to Federal Power Commission rate schedules and that another fourteen percent of CEI's deliveries were trades of power with other electric utilities called "Interchange Power". CEI at page 3 of its Brief stated that the only sales for resale ". . . in the true sense of the word, is the sale to Petitioner for its municipal electric light plant . . .". CEI went on to point out that CEI's other sales to electric utilities ". . . were almost exactly balanced by the receipts from the same group of companies to which the deliveries were made. . .".

It should be noted that the prices paid by CEI for its receipts of electricity from other electric utilities were gen-

erally much higher than the revenues CEI received from its deliveries. For instance, the Company as shown on page 126 of the City's Petition received 201,517,000 KWHR from the PJM group at a cost of $3,482,231; that is an average of 1.7 cents per KWHR. The Company as also shown on the same page delivered 350,153,000 KWHR to this Pennsylvania, New Jersey and Maryland group of utilities for a total charge of $2,662,184; that is an average of less than eight tenths of a cent per KWHR. The other disparities in purchase and sale prices are not so large, but they are also significant. These disparities show that the Company's attempt to portray this commerce as mere trades of power is invalid.

Even, if the Company were correct in maintaining that all of its deliveries to other utilities should be considered as mere trades of power or as "Interchange Power", it would still be necessary to consider these transactions as commerce falling under the Commerce Clause (Clause 3 of Section 8 of Article I of the United States Constitution) and therefore beyond the jurisdiction of the Public Utilities Commission of Ohio. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), at pages 189-90, in delivering the opinion of the Court said that commerce as employed in the Commerce Clause embraces much more than "traffic . . . buying and selling, or the *interchange of* commodities . . ." (emphasis added).

The Company at page 2 of its 1971 Annual Report to the stockholders (Appendix C to Company Exhibit 20 before the Commission) acknowledged that these deliveries of electricity to other utilities have an important impact upon the Company's profitability by admitting that:

> "Another factor which adversely affected earnings resulted from a contract entered into with a neighbor utility in 1965. According to terms of the contract each utility agreed to supply mutual back-up power

> in the event of an outage of companion 650,000—Kilowatt generating units. Because of an extended outage on our neighbor's unit, we were obligated to provide that company with more than 466 million Kilowatt-hours during 1971 . . . ."

Counsel for the Commission did not attempt to meet the data given in the City's Petition. Instead Counsel relies on the self-serving excuses of the Commission's staff to the effect that allocations were unnecessary because they were unnecessary in the opinion of the staff. That opinion is predicated upon the false assumption (see page 9 of the Company's brief) that the Company did not have any sales other than with the City of Cleveland; that opinion is at war with reality.

CONCLUSION

The Public Utilities Commission of Ohio erred in failing to separate plant, revenues, and expenses related to the Company's interstate commerce from the plant, revenues, and expenses allocable to its intrastate commerce. In doing this, the Commission has exceeded its jurisdiction by setting the profit which the Company could earn on both its interstate and intrastate business.

The City of Cleveland's Petition for Writ of Certiorari should be granted so that the intrastate rates set by the

Commission may be vacated and redesigned to properly reflect only intrastate plant, revenues, and costs in accordance with the separation of state and Federal authority required by the Commerce Clause of the United States Constitution.

Respectfully submitted,

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